Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 804

THE SUNSHINE ANTHRACITE COAL COMPANY,
APPELLANT,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL
REVENUE FOR THE DISTRICT OF ARKANSAS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF ARKANSAS

FILED MARCH 12, 1940.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas, Defendant

COMPLAINT—Filed May 9, 1938

Paragraph 1.

Comes now the Sunshine Anthracite Coal Company, by its attorneys, and complains of Homer M. Adkins as Collector of Internal Revenue for the District of Arkansas, and for first paragraph of complaint alleges and says:

1. That plaintiff is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of $3,000.00 exclusive of interest and costs.

3. That plaintiff is the Lessee of four hundred acres of coal situate in Johnson County, State of Arkansas, on which it is erecting tipples, buildings and other structures, and is engaged in the business of mining and shipping coal, and that there is available and arrangements have been made for the plaintiff to lease an additional acreage up to approximately two thousand acres adjoining and [fol. 2] adjacent to the lands now held under lease by said plaintiff.

4. That the defendant, Homer M. Adkins, is a citizen of the State of Arkansas, residing in the City of Little Rock, Pulaski County, Arkansas, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

5. That on the 26th day of April, 1937, the Congress of the United States at its 75th Session, enacted the Bituminous Coal Act of 1937 (50 Statutes at Large, 72 et seq.—U. S. C. A. Title 15, Sections 828-851 inc.). That by Section 3 of said Bituminous Coal Act of 1937, alleged excise taxes were levied as follows:

(a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by producer thereof, an excise tax of one cent (1¢) per ton of two thousand pounds.

The term "disposal" as used in this section, includes consumption (or use whether in the production of coke or fuel or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by sub-section (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the applications and conditions and provisions of the code provided for in sections 831-833, or of the provisions of section 834, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and sold otherwise than through an arm's length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in sections 831-833 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership of the code, of coal produced by him shall be exempt from the tax imposed by this sub-section.

[fol. 3] (c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. (U. S. C. A. Title 15, Sec. 830.)

6. That said Bituminous Coal Act of 1937 in addition to the so-called taxes hereinabove set out, establishes the National Bituminous Coal Commission, subdivides the territory of the United States into districts, and provides for the organization of codes in the various districts, and fixes powers and duties of the coal commission in the District Boards, all of said act constituting a detailed scheme or method to control the production and distribution of bituminous coal produced in the United States of America by so-called code members and sold in interstate commerce, and the said National Bituminous Coal Commission, since its establishment under and by virtue of said law, has entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intrastate commerce in the State of Arkansas and other states shall be subject to the provisions of the National Bituminous Coal Act of 1937; that said act purports to provide for voluntary membership in the codes established under and by virtue of the provisions of said act; that said act further defines the term "Bituminous Coal" as including all "bituminous, semi-bituminous, and sub-bituminous coal" and excludes from the operation of said act, all coal other than bituminous coal as thus defined; that said act by Section 7 thereof further provides that all provisions of law, including penalties and refunds, applicable with respect to the taxes imposed by Title IV of the Revenue Act of 1932 as amended, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to taxes imposed under this subchapter.

7. That the plaintiff has not subscribed to nor accepted the provisions of the code promulgated by the National [fol. 4] Bituminous Coal Commission under the provisions of said act, and that plaintiff, therefore, is not a code member within the meaning of said act; that by reason of its

non-acceptance of said code and plaintiff's refusal to subscribe thereto, the plaintiff, in addition to being compelled to pay a tax of one cent on each ton sold, is subject to an additional tax of nineteen and one-half per centum of the sale price or the fair market value of the coal at the time of sale or disposal of the same.

8. That the plaintiff is engaged in developing a commercial mine for the purpose of producing coal from its coal mine property located in said Johnson County, Arkansas; that all of the coal produced at said mine is sold by this plaintiff f. o. b. mines; that said mine will, when fully developed, produce and market approximately one thousand tons of coal per day; that said mine is located in and produces coal from what is commonly known as the Spadra field, and mines and produces, and will mine and produce, a coal which has been sold on the open market for more than twenty years as Arkansas Anthracite coal; that said coal has never been either advertised or sold as bituminous, semi-bituminous or sub-bituminous coal; that prior to the development of the mine now in course of development, plaintiff for a long period of time operated a shaft mine on territory adjacent and contiguous to the mine now being developed, and producing the same quality and kind of coal and from the same seam as is now being produced and will be produced by plaintiff in the new development, and that said coal at all times has been sold and marketed as Arkansas Anthracite coal; that the coal produced at said mine is of a grade superior to coals commonly and generally sold as Bituminous or semi-bituminous or sub-bituminous coal, and has the characteristics of Anthracite or semi-anthracite coal, and that the coal produced by this plaintiff is not adapted to the uses commonly and generally made of bituminous or semi-bituminous or sub-bituminous coal, but is adapted to the uses commonly and generally [fol. 5] made of anthracite and semi-anthracite coal, and, therefore, plaintiff charges the fact to be that the coal produced and marketed by this plaintiff is neither bituminous, semi-bituminous nor sub-bituminous coal, and not within the purview of the act, and therefore, not subject to the alleged taxes levied and provided for under and by virtue of the terms of the National Bituminous Coal Act of 1937.

9. That plaintiff is producing at its mine in the process of development at the present time at the rate of approxi-

mately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of $17,000.00 per month; that said sales will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

10. That the alleged excise taxes attempted to be imposed upon this plaintiff by this defendant each month will amount at the present time to approximately $2,500.00 per month, and will increase substantially each month as the development of said mine progresses, and will, if said alleged taxes are so imposed by defendant upon this plaintiff, eventually reach a maximum of six to eight thousand dollars per month; that said plaintiff has invested in the mine and machinery located upon said property an amount in excess of $400,000.00, and that the profit realized and realizable on the gross sale price on the coal produced by it each month over the cost of production, and under prudent and economical operation, will not exceed ten per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiff's mine is located; that the profit thus realized would be totally inadequate and insufficient to pay the alleged excise taxes of one cent and nineteen and one-half per centum of the sale price, and [fol. 6] therefore, if plaintiff is required to pay said alleged taxes, plaintiff would of necessity operate said mine at a substantial loss each month, which would shortly aggregate a sum sufficient to render plaintiff insolvent and unable to operate its mine and produce and market coal, and would thus destroy, render of no value and confiscate the property of plaintiff and its investment therein; that the coal mined and removed by this plaintiff is not owned by plaintiff, but is under lease to plaintiff and under and by virtue of the terms of said lease plaintiff is required to pay royalty at twenty-five cents per ton for each ton of coal mined and produced, and by the terms of said lease, must produce a sufficient amount of coal to pay the owner a minimum royalty of $5,000.00 per year, which said minimum royalty would be accumulated in the event said mine of plaintiff was not operated, and should plaintiff be compelled to close down its mine because of the imposition of the alleged excise

taxes, plaintiff would still be at a heavy expense in the upkeep of its properties and in the payment of said minimum royalty. Plaintiff further avers that substantially all of its capital and surplus is invested in the mine and equipment, and the only method by which it could possibly provide funds with which to pay said alleged excise taxes over a period of time would be to sell or dispose of its property, or to mortgage the same, and that said plaintiff under the circumstances would be unable to sell or dispose of said property or procure money by mortgage on said property; plaintiff further avers that it would be impossible for it to borrow money with which to pay the alleged excise taxes, for the reason that its operating statement would show a substantial loss, and for the further reason that mining property is not taken or considered as good security for loans under present market conditions; plaintiff further avers that the alleged 19½ per centum additional excise taxes on the sale price of coal is, in truth and in fact, a penalty [fol. 7] levied in such an enormous amount with the intended result of forcing this plaintiff to join and come under the code promulgated under said National Bituminous Coal Act; that plaintiff, if compelled to pay said alleged excise taxes each month, will be unable to continue the development and operation of said coal mine, and will be compelled to abandon said operation, thereby suffering immediate and irreparable injury.

11. Plaintiff further avers that the defendant herein, in violation of law, is threatening to and will unless restrained by this court, assess said alleged excise taxes against this plaintiff under and by virtue of the tax provisions of the Bituminous Coal Act of 1937, and is threatening to and will, unless restrained by this court, seize and sell the property of this plaintiff for the payment of said alleged excise taxes.

12. That Congress has made no appropriation out of which and with which to pay any judgment for refund which may ultimately be procured by plaintiff for so-called excise taxes and so-called additional excise taxes to be paid by the plaintiff to the said defendant upon the demand of said defendant, and it is entirely uncertain when plaintiff will be reimbursed on account of taxes exacted of it by the said defendant under and by virtue of the provisions of said act.

13. That the provisions of said National Bituminous Coal Act for refund are indefinite and uncertain; that the pen-

alties to which plaintiff may be and become liable on account of the alleged assessment of these alleged excise taxes are indefinite and uncertain; that refund of the alleged excise taxes, if paid, would be indefinite and uncertain as to time and could be recovered only after vaxatious and long-draw-out litigation, and that a final adjudication of the liability of plaintiff herein for said alleged excise taxes and penalties could not be had and obtained prior to the First of March, 1939, and could not be had or obtained in time to prevent the involvency of this plaintiff and the seiz-[fol. 8] ing of its operations; that said alleged excise taxes are payable each month and plaintiff would be compelled to pay said taxes each month and to file claim for refund for each payment of said taxes and file various suits for return of said taxes; that if plaintiff is compelled to pay said alleged excise taxes until final adjudication, said taxes will be in an amount so large that it will be forced to close and abandon its mine and its leasehold interest will be forfeited by the owners thereof, and the property of plaintiff herein will be confiscated and destroyed and the plaintiff herein will lose its investment in said mine and be and become insolvent. Therefore, plaintiff charges the fact to be that plaintiff is without adequate remedy at law and is without remedy in the premises except in a court of equity.

Wherefore, plaintiff prays for the issuance of a temporary writ of injunction upon such terms as the court may deem just and proper restraining the defendant from enforcing or attempting to enforce against plaintiff the alleged liability for tax and so-called additional tax, and the alleged lien of the taxes against the plaintiff's property; that subpoena issue and be served upon the defendant as provided by law; that on final hearing the injunction be perpetuated, and that plaintiff have decree cancelling the claim of assessment of taxes against it, and for such other and further relief that it may be entitled to, conformable to the principles of equity and the practice of this court.

Paragraph 2

Comes now the plaintiff, and for second and further paragraph of complaint, complains of Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, and alleges and says:

1. That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the

[fol. 9] State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of $3,000.00 exclusive of interest and costs.

3. That plaintiff is the Lessee of four hundred acres of coal situate- in Johnson County, State of Arkansas, on which it is erecting tipples, buildings and other structures, and is engaged in the business of mining and shipping coal, and that there is available and arrangements have been made for the plaintiff to lease an additional acreage up to approximately two thousand acres adjoining and adjacent to the lands now held under lease by said plaintiff.

4. That the defendant, Homer M. Adkins, is a citizen of the State of Arkansas, residing in the City of Little Rock, Pulaski County, Arkansas, and is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

5. That on the 26th day of April, 1937, there was enacted by the Congress of the United States at its 75th Session, the Bituminous Coal Act of 1937, (50 Statutes at L., 72 et seq. U. S. C. A. Title 15—Sections 828 to 851, Inc.).

[fol. 10] 6. That the provisions of said Act are substantially as follows, to-wit:

A. Section 1 is a declaration of the necessity for regulation of the sale and distribution of bituminous coal in interstate commerce.

Section 2 (A) establishes in the Department of the Interior a National Bituminous Coal Commission composed of seven members appointed by the President, by and with the advice and consent of the Senate, and fixes the terms,

qualifications, compensation, etc., of the members of the said commission. It also delegates to the commission the power to "make and promulgate all reasonable rules and regulations for carrying out the provisions of this sub-chapter;" provides for reports to Congress of the Commission's activities, and declares how many members of the Commission shall constitute a quorum. It further regulates the hearings and the fact finding power of the Commission; provides for divisions of the commission; for reference of matters to individual commissioners, employees or examiners for hearings and recommendations, gives judicial powers, and authorizes the making of contracts for personal services. It further authorizes the Commission to do such acts as it deems necessary and proper to promote the use of coal and its derivatives.

Section 2 (B) (1) establishes the office of the Consumers' Counsel of the National Bituminous Coal Commission, such counsel to be appointed by the President, by and with the advise and consent of the Senate, and fixes such counsel's qualifications and compensation.

Section 2 (B) (2) fixes the duties and powers of the aforesaid Consumer's Counsel.

Section 2 (B) (3) provides for the appointment and compensation of employees of the Consumers' Counsel.

Section 2 (B) (4) provides for reports of the Consumers' Counsel to Congress.

[fol. 11] Section 3 (A) imposes an excise tax of one (1) cent per ton of 2,000 pounds on the sale or other disposal, of all bituminous coal mined in the United States.

Section 3 (B) imposes an additional excise tax of 19½ per centum of the sale price (or market value in some cases) of coal sold or disposed of, but exempt from the payment of such tax "Code Members" as provided in Section 4, Parts I and II, of the Act.

Section 3 (C) provides that "taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be pre-

scribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury."

Section 3 (D) provides for the determination of the market value of coal sold otherwise than through an arm's length transaction.

Section 3 (E) provides that the tax imposed by Section 3 (A) shall not apply when coal is sold for the exclusive use of the United States, any State or Territory thereof, or the District of Columbia, and provides for certain refunds and credits in such cases.

Section 3 (F) provides that no producer who accepts the code provided for in Section 4, parts I and II, shall be barred from contesting the provisions of the act, or the application of this act to him or coal produced by him.

Section 4 provides for the promulgation of the "Bituminous Coal Code" by the Commission, applicable solely to producers who become code members.

Section 4, Part I (A) requires the organization of twenty-three district boards of code members for each of twenty-three districts designated in an attached "Schedule of Dis-[fol. 12] tricts" and outlines the method of selection of the members thereof, their terms, compensation and certain of their powers.

Section 4, Part I (B) provides for the assessment of code members to pay the expenses of administering the code.

Section 4, Part I (C) relieves the members and officers of the district boards from any connected liabilities except their "Own willful misfeasance or for non-feasance involving moral turpitude."

Section 4, Part I (D) exempts code members, district boards and officers from the prohibition of the anti-trust laws of the United States.

Section 4, Part II, gives the Commission the power to prescribe for code members only minimum and maximum prices, and marketing rules and regulations. It provides for the collection of data and statistics covering the preparation, cost, sale and distribution of coal; it designates minimum prices areas; provides for complaints to the Commission, and hearings and orders thereon; regulates coal sale con-

acts, and defines what acts shall be unfair methods of competition and shall constitute violations of the code.

Section 4-A provides for the determination by the Commission that Intrastate commerce in coal effects interstate coal and the subsequent regulations of such intrastate commerce under Section 4, Part I and II. It also provides for hearings and exemptions on claims by producers that any commerce in coal is not subject to Section 4, Parts I and II.

Section 5 (A) provides for the acceptance of the code by producers.

Section 5 (B) provides for the revocation of membership of producers, and the revocation of the right to exemption from the tax imposed by Section 3 (B) after hearing on a charge of having violated the code.

[Vol. 13] Section 5 (C) provides for the restoration of members after conviction for code violations under Section (B).

Section 5 (D) provides for the recovery of treble damages and attorney's fees in civil suits by one code member against another where one is damaged by code violations on the part of the other.

Section 6 (A) provides for appeals from district boards to the Commission.

Section 6 (B) provides for appeals from the Commission to the United States Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, and further appeals to the Supreme Court of the United States.

Section 6 (C) provides for the enforcement of the orders of the Commission through the Circuit Court of Appeals of the United States, and Section 6 (D) gives the said Circuit Court of Appeals exclusive jurisdiction in enforcing, setting aside and modifying orders of the Commission.

Section 7 applys the provisions of Title IV of the Revenue Act of 1932, as amended, insofar as applicable and not inconsistent, to the taxes imposed in this act.

Section 8 outlines the powers of the Commission and its members in the conduct of hearings, and the status of witnesses at such hearings.

Section 9 (A) states the public policy of the United States as to the rights of labor.

Section 9 (B) prevents the United States or its departments or agencies from purchasing coal produced in any mine where employees are denied the rights set forth in Section 9 (A).

Section 9 (C) provides that, after a hearing before the Commission, and a finding by the Commission, that any pro- [fol. 14] ducer supplying coal to the United States or an agency thereof is not complying with the principles stated in Section 9 (A), such contract for the purchase of coal shall be canceled and terminated.

Section 9 (D) provides that the provisions of this act shall not repeal or modify the provisions of the National Labor Relations Act, or any other act of Congress regarding labor relations.

Section 10 provides for the furnishing of statistical information to the Commission by code members; imposes penalties upon Commission officers or employes for unlawfully disclosing the information this furnished, and imposes penalties upon code members failing to furnish information when required to do so.

Section 11 states: "state laws regulating the mining of coal not inconsistent herewith are not affected by this subchapter."

Section 12 provides that combinations between producers who are not code members, creating a marketing agency for competitive coals, shall be unlawful, and in restraining of trade; but that such combinations between code members, and under the provisions of the code, are legal. It provides for approval of such latter combinations by the Commission and for regulation of them by the Commission.

Section 13 is the separability clause.

Section 14 mandates the Commission to study and investigate the coal industry, and report its findings annually to the Secretary of Interior for transmission by him to Congress.

Section 15 provides for complaints to the Commission upon charges that prices fixed are excessive and oppressive,

or that any district board or marketing agency is operating against the public interest or in violation of the code.

Section 16 provides for appearance before the Interstate Commerce Commission, either as complainant or defendant, of the Commission or Consumers' Counsel, where coal rates are involved.

[fol. 15] Section 17 contains definitions of terms used in the act.

Section 18 designates the effective date of the Act.

Section 19 provides the term for which the Act shall be in effect.

Section 20 specifically repeals the Bituminous Coal Conservation Act of 1935, and makes available for the present Commission all records, property, equipment and appropriations of the Commission and Consumers' Counsel under the 1935 Act, and provides for appropriations of sums necessary for the administration of this Act.

Section 21 states, "This sub-chapter may be cited as the Bituminous Coal Act of 1937."

And annex to the Act contains the Schedule of Districts designated in Section 4, Part 1 (A).

7. That the plaintiff herein has not subscribed to nor accepted the provisions of the code promulgated by the National Bituminous Coal Commission under the provisions of the act, and is therefore, not a code member as defined in said act.

8. That by reason of its non-acceptance of said code and plaintiff's refusal to subscribe thereto, plaintiff, in addition to being compelled to pay a tax of one cent on each ton of coal sold, is liable for the so-called alleged additional tax and of nineteen and one-half per centum of the sale price or the fair market value of the coal at the time of the sale or disposal of the same.

9. That said tax is now accruing and has been accruing on all coal produced by the plaintiff since the first day of September, 1937, and that the defendant intends to levy said tax and attempt to enforce the collection of the same, in each and every month hereafter as said tax accrues.

[fol. 16] 10. That said additional tax imposed on the plaintiff by reason of not subscribing or accepting the provisions of said code is a penalty and not a tax.

11. That plaintiff is producing at its mine in the process of development at the present time at the rate of approximately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of $15,000.00 per month; that said sale will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month, and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

12. That plaintiff's mine buildings, equipment and appliances are of the value of $400,000.00.

13. That Congress has made no appropriation out of which and with which to pay any judgment for refund which may be ultimately secured by plaintiff for taxes to be paid by plaintiff under the provisions of the Act; and it is entirely uncertain when plaintiff will be reimbursed on account of taxes exacted of it under the provisions of the Act.

14. That the alleged excise taxes attempted to be imposed upon this plaintiff by this defendant each month will amount at the present time to approximately $1,200.00 per month, and will increase substantially each month as the development of said mine progresses, and will, if said alleged taxes are so imposed by defendant upon this plaintiff, eventually reach a maximum of six to eight thousand dollars per month; that said plaintiff has invested in the mine and machinery located upon said property an amount in excess of four hundred thousand dollars ($400,000.00), and that the profit realized and realizable on the gross sale price on the coal produced by it each month over the cost of production, and under prudent and economical operation, [fol. 17] will not exceed ten per cent, and such profit is not less than the profit realized by the producers generally in the field where plaintiff's mine is located; that the profit thus realized would be totally inadequate and insufficient to pay the alleged excise taxes of one per cent and nineteen and one-half per centum of the sale price, and therefore, if plaintiff is required to pay said alleged taxes, plaintiff would of necessity operate said mine at a substantial loss each

month, which would shortly aggregate a sum sufficient to render plaintiff insolvent and unable to operate its mine and produce and market coal, and would thus destroy, render of no value and confiscate the property of plaintiff and its investment therein; that the coal mined and removed by this plaintiff is not owned by plaintiff, but is under lease to plaintiff and under and by virtue of the terms of said lease plaintiff is required to pay royalty at twenty-five cents per ton for each ton of coal mined and produced, and by the terms of said lease, must produce a sufficient amount of coal to pay the owner a minimum royalty of $5,000.00 per year, which said minimum royalty would be accumulated in the event said mine of plaintiff was not operated, and should plaintiff be compelled to close down its mine because of the imposition of the alleged excise taxes, plaintiff would still be at a heavy expense in the upkeep of its properties and in the payment of said minimum royalty. Plaintiff further avers that substantially all of its capital and surplus is invested in the mine and equipment, and the only method by which it could possibly provide funds with which to pay said alleged excise taxes over a period of time would be to sell or dispose of its property, or to mortgage the same, and that said plaintiff under the circumstances would be unable to sell or dispose of said property or procure money by mortgage on said property; plaintiff further avers that it would be impossible for it to borrow money with which to pay the alleged excise taxes, for the reason that its operating statement would show a substantial loss, and for the further reason that mining property is not taken [fol. 18] or considered as good security for loans under present market conditions; plaintiff further avers that the alleged 19½ per centum additional excise taxes on the sale price of coal is, in truth and in fact, a penalty levied in such an enormous amount with the intended result of forcing this plaintiff to join and come under the code promulgated under said National Bituminous Coal Act; plaintiff, is compelled to pay said alleged excise taxes each month, will be unable to continue the development and operation of said coal mine, and will be compelled to abandon said operation, thereby suffering immediate and irreparable injury.

15. That plaintiff is without adequate remedy at law and is without remedy in the premises except in a court of equity.

16. Plaintiff further avers that the defendant herein, in violation of law, is threatening to and will, unless restrained by this court, assess said alleged excise taxes against this plaintiff under and by virtue of the tax provisions of the Bituminous Coal Act of 1937, and is threatening to and will, unless restrained by this court, seize and sell the property of this plaintiff for the payment of said alleged excise taxes.

17. That on the 26th day of April, 1937, the Congress of the United States at its 75th Session, enacted the Bituminous Coal Act of 1937 (50 Statutes at Large, 72 et seq.—U. S. C. A. Title 15, Sections 828-851 inc.). That by Section 3 of said Bituminous Coal Act of 1937, alleged excise taxes were levied as follow-:

(a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by producer thereof, an excise tax of one cent (1¢) per ton of two thousand pounds.

The term "disposal" as used in this section, includes consumption (or use whether in the production of coke or fuel or otherwise) by a producer, and any transfer of title by the producer other than by sale.

[fol. 19] (b) In addition to the tax imposed by sub-section (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof, which would be subject to the applications and conditions and provisions of the code provided for in sections 831-833, or of the provisions of section 834, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arm's length transacton, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 831-833 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership of the code, of coal produced by him shall be exempt from the tax imposed by this sub-section.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for such calendar month on or before the first business day of the second succeeding month under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

18. That said Bituminous Coal Act of 1937 in addition to the so-called taxes hereinabove set out, establishes the National Bituminous Coal Commission, subdivides the territory of the United States into districts, and provides for the organization of codes in the various districts, and fixes powers and duties of the coal commission in the District Boards, all of said act constituting a detailed scheme or method to control the production and distribution of bituminous coal produced in the United States of America by Code Members only and sold in interstate commerce, and the said National Bituminous Coal Commission, since the establishment under and by virtue of said law, had entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intra-state commerce in the State of Arkansas and other states shall be subject to the provisions of the National Bituminous Coal Act of 1937; that said act purports to provide for voluntary membership in the codes established under and by virtue of the provisions of said [fol. 26] act; that said act further defines the term "Bituminous Coal" as including all "bituminous, semi-bituminous and sub-bituminous coal" and excludes from the operation of said act, all coal other than bituminous coal as thus defined; that said act by Section 7 thereof provides that all provisions of law, including penalties and refunds, applicable with respect to the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this sub-chapter, be applicable with respect to taxes imposed under this sub-chapter; that the regulation provided for by the code embraced in said act applied solely to those producers of bituminous coal who have accepted membership in the code provided for in said act.

19. That the plaintiff is engaged in developing a commercial mine for the purpose of producing coal from its coal mine property located in said Johnson County, Arkansas;

that all of the coal produced at said mine is sold by this plaintiff f. o. b. mines; that said mine will, when fully developed, produce and market approximately one thousand tons of coal per day; that said mine is located in and produces coal from what is commonly known as the Spadra field, and mines and produces, and will mine and produce, a coal which has been sold on the open market for more than twenty years as Arkansas Anthracite coal; that said coal has never been either advertised or sold as bituminous, semi-bituminous or sub-bituminous coal; that prior to the development of the mine now incourse of development, plaintiff for a long period of time operated a shaft mine on territory adjacent and contiguous to the mine now being developed, and producing the same quality and kind of coal and from the same seam as is now being produced and will be produced by plaintiff in the new development, and that said coal at all times has been sold and marketed as Arkansas Anthracite coal; that the coal produced at said mine is of a grade superior to coals commonly and generally sold as [fol. 21] Bituminous or semi-bituminous or sub-bituminous coal, and has the characteristics of anthracite or semi-anthracite coal, and that the coal produced by this plaintiff is not adapted to the uses commonly and generally made of bituminous or semi-bituminous or sub-bituminous coal, but is adapted to the uses commonly and generally made of anthracite and semi-anthracite coal, and therefore, plaintiff charges the fact to be that the coal produced and marketed by this plaintiff is neither bituminous, semi-bituminous nor sub-bituminous coal, and not within the purview of the act, and therefore, not subject to the alleged taxes levied and provided for under and by virtue of the terms of the National Bituminous Coal Act of 1937.

20. That plaintiff is producing at its mine in the process of development at the present time at the rate of approximately six thousand tons of coal per month, and that said coal so produced is now being sold at the approximate sale price of $15,000.00 per month; that said sale will, in the course of the development of said mine, increase to approximately fifteen to twenty thousand tons per month, and the realization from the sale of said coal will increase to approximately forty to fifty thousand dollars per month when and as the mine has been developed to its potential capacity.

21. That the provisions of said Act, known as the Bituminous Coal Act of 1937 are as applied to this plaintiff invalid, null and void in this, to-wit;

A. That it is beyond the power of Congress to legislate upon the business of producing and selling bituminous coal, as the business is a private one and not affected with a public interest.

B. That said Act constitutes an unwarranted delegation of the legislative function of the Congress of the United States.

C. That it deprives plaintiff of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

[fol. 22] D. That it constitutes an invasion by the government of the United States of America of rights and powers reserved to the several states by the Tenth Amendment to the Constitution of the United States.

E. That the additional tax imposed on plaintiff as a non-code producer and seller of coal is not a good faith exercise of the taking power conferred upon Congress by Clause 1 of Section 8, Article 1 of the Constitution of the United States, but is an unconstitutional attempt by Congress to penalize plaintiff for not subscribing to or accepting the provisions of the code promulgated by the National Bituminous Coal Commission.

F. That said Bituminous Coal Act of 1937 is an arbitrary and unreasonable classification and attempts to regulate the sale and distribution in interstate commerce of that part of the bituminous coal produced in the United States by code members only and is in violation of the Fifth Amendment to the Constitution of the United States.

G. That said Bituminous Coal Act of 1937 attempts to levy a so-called excise tax in violation of Article 1, Section 8, Clause 1 of the Constitution of the United States.

22. Wherefore, the plaintiff is in need of equitable relief.

Wherefore, the plaintiff prays for the issuance of a temporary writ of injunction upon such terms as to the Court may seem proper, restraining the defendant from enforcing or attempting to enforce against plaintiff the al-

leged tax liability and the alleged lien against the plaintiff's property; that subpoena issue and be served upon the defendant as provided by law; that on final hearing the injunction be perpetuated; that plaintiff have decree cancelling the claim of assessment of taxes against it, and for such other and further relief as it may be entitled to, [fol. 23] conformable to the principles of equity and the practice of this Court.

(Signed) Adamson, Blair & Adamson, Terre Haute, Ind. (Signed) Patterson & Patterson, Clarksville, Ark.

[File endorsement omitted.]

[fol. 24] In United States District Court

[Title omitted]

Motion for Preliminary Injunction and Application for Designation of Statutory Court—Filed May 9, 1938

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and by reason of the facts set forth in its verified bill of complaint for injunction, heretofore filed, which facts constitute the grounds of this motion, and specifically by reason of the immediate, substantial, and irreparable damages described therein, all of which matters will be more fully established and proved by affidavits or exhibits and testimony, as the court may direct, at or before hearing upon this motion, moves this Court that a preliminary injunction be granted against the defendant after notice, pending the final determination of this suit, enjoining him as prayed in the bill of complaint for injunction.

And plaintiff further requests that the honorable judge before whom this motion comes will immediately call upon the senior Circuit Judge to designate two other judges to participate in hearing and determining the motion.

Adamson, Blair & Adamson, Terre Haute, Ind; Patterson & Patterson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 25] (Order designating three-judge court signed by Kimbrough Stone, senior Circuit Judge, omitted in printing.)

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed May 31, 1938

Comes now the defendant Homer M. Adkins, Collector of Internal Revenue for the District of Arkansas, and for answer to the bill of complaint filed herein respectfully states:

1. Defendant admits the allegations of paragraph 1 of Part I of the bill of complaint.

2. Defendant admits the allegations of paragraph 2 of Part I of the bill of complaint.

3. Defendant admits that plaintiff is the lessee of coal lands in Johnson County, Arkansas, and is engaged in the business of mining and shipping coal. Defendant is without knowledge as to the remaining allegations of paragraph 3 of Part I of the bill of complaint.

4. Defendant admits the allegations of paragraph 4 of Part I of the bill of complaint.

5. Defendant admits the allegations of paragraph 5 of Part I of the bill of complaint.

6. For answer to paragraph 6 of Part I of the bill of complaint, defendant avers that the Bituminous Coal Act speaks for itself and that he is not required to answer the [fol. 27] allegations with respect to the contents thereof. Defendant admits that the National Bituminous Coal Commission has entered orders declaring that all bituminous coal sold, delivered, or offered for sale in intrastate commerce in the State of Arkansas and certain other States (but not all States) shall be subject to the provisions of the Bituminous Coal Act of 1937 inasmuch as such sales were found, after hearing, to directly affect interstate commerce.

7. Defendant admits the allegations of paragraph 7 of Part I of the bill of complaint.

8. Defendant admits that plaintiff has operated and operates a coal mine in Johnson County, Arkansas, in the Spadra Field. Defendant denies that the coal produced and marketed by plaintiff is neither bituminous, semi-bituminous, nor sub-bituminous coal, and avers on the contrary that the coal produced by plaintiff is within the purview of the Bituminous Coal Act and is subject to the taxes levied under said Act. Defendant is without knowledge as to the remaining allegations contained in paragraph 8 of Part I of the bill of complaint.

9. Defendant is without knowledge as to the allegations contained in paragraph 9 of Part I of the bill of complaint.

10. Defendant is without knowledge as to the allegations of fact contained in paragraph 10 of Part I of the bill of complaint. Defendant avers that the allegation that the 19½ per cent excise tax on the sale price of coal is a penalty levied in such an enormous amount with the intended result of forcing the plaintiff to join and come under the Code promulgated under the Bituminous Coal Act is a conclusion of law which defendant is not required to answer.

11. Defendant admits the allegations contained in paragraph 11 of Part I of the bill of complaint, except that defendant denies that his conduct is in violation of law.

12. For answer to paragraph 12 of Part I of the bill of [fol. 28] complaint, defendant admits that it is uncertain exactly when plaintiff will be reimbursed on account of taxes exacted under the provisions of the Bituminous Coal Act. Defendant admits that Congress has made no specific appropriation for the payment of a refund to the plaintiff, but avers that each year an appropriation is made for the refund of all over-payments of taxes, whether determined administratively or by the courts, and that if plaintiff is held to be entitled to a refund of taxes paid under the Bituminous Coal Act such refund would be made.

13. Answering paragraph 13 of Part I of the bill of complaint, defendant admits that the time of the refund of any alleged excise taxes to plaintiff would be indefinite and uncertain, and that the excise taxes imposed by the Bituminous Coal Act are payable each month and that plaintiff would be compelled to pay said taxes each month, and to file claim for refund for each payment of said taxes and to file suits

for the return of said taxes (if plaintiff desired to have the taxes refunded), but defendant denies that plaintiff would have to file numerous suits for the return of said taxes. Defendant is without knowledge as to any of the remaining allegations of fact in the said paragraph 13, and avers that he is not required to make answer to the conclusions of law contained in the said paragraph.

For answer to Part II of the bill of complaint defendant respectfully states:

14. For answer to paragraphs 1, 2, 3, and 4 of Part II of the bill of complaint, defendant makes the same answer as to paragraphs 1, 2, 3, and 4 of Part I, respectively.

15. For answer to paragraphs 5 and 17 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 5 of Part I of the bill of complaint.

16. For answer to paragraphs 6 and 18 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 6 of Part I of the bill of complaint.

[fol. 29] 17. For answer to paragraphs 7 and 8 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 7 of Part I of the bill of complaint.

18. Defendant admits the allegation contained in paragraph 9 of Part II of the bill of complaint.

19. Defendant avers that the allegation in paragraph 10 of Part II of the bill of complaint is a conclusion of law which he is not required to answer.

20. For answer to paragraphs 11 and 20 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 9 of Part I of the bill of complaint.

21. Defendant is without knowledge as to the allegation contained in paragraph 12 of Part II of the bill of complaint.

22. For answer to paragraph 13 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 12 of Part I of the bill of complaint.

23. For answer to paragraph 14 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 10 of Part I of the bill of complaint.

24. Defendant avers that the allegations in paragraph 15 of Part II of the bill of complaint are allegations of law which he is not required to answer.

25. For answer to paragraph 16 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 11 of Part I of the bill of complaint.

26. Answering paragraph 19 of Part II of the bill of complaint, defendant makes the same answer as to paragraph 8 of Part I of the bill of complaint.

27. Defendant denies the allegations of paragraph 21 of Part II of the bill of complaint, and avers that the Bituminous Coal Act of 1937 is in all respects constitutional.

[fol. 30] 28. Defendant avers that the allegation contained in paragraph 22 of Part II of the bill of complaint is a conclusion of law which he need not answer.

For affirmative answer to the bill of complaint herein defendant avers that:

29. Plaintiff produces and ships in interstate commerce bituminous and semi-bituminous coal, and accordingly is subject to the provisions of the Bituminous Coal Act of 1937.

30. Plaintiff on August 31, 1937, filed a petition for exemption from the Bituminous Coal Act of 1937 with the National Bituminous Coal Commission alleging that its coal was not subject to the provisions of the Act. Thereupon the National Bituminous Coal Commission on September 24, 1937, issued its Order No. 53 directing that a hearing be held before an examiner of the Commission in Fort Smith, Arkansas, on October 4, 1937, for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Act and for the further purpose of hearing applications for exemption. Due and reasonable notice of said hearing was given all interested parties. The hearing was held at the time specified, the plaintiff, among others, being heard; and 493 pages of testimony was taken. On January 21, 1938, the examiner filed his report, proposed findings of fact and recommendations with the Commission, which were duly served upon all interested parties and the plaintiff. In his report, the examiner found that the coal produced by plaintiff was bituminous coal subject to the Act and recommended that the Commission deny the application for exemption. There-

upon, the plaintiff filed a motion with the Commission to withdraw its application for exemption, which motion was denied. On May 7, 1938, the Commission served on the parties to the proceeding, including plaintiff, its proposed report, in which it tentatively found that the coal produced by plaintiff is bituminous coal within the meaning of sec-
[fol. 31] tion 17(b) of the Bituminous Coal Act of 1937. The proposed report was accompanied by a notice stating that the parties might file exceptions thereto, and briefs, within thirty days, and also that they might request oral argument before the Commission, and that in the absence of the filing of exceptions the said proposed report would become effective as the report of the Commission at the expiration of the thirty-day period.

31. The said Bituminous Coal Act provides that any producer who is a code member and is so certified to the Commissioner of Internal Revenue is exempt from the 19½ per cent tax imposed by Section 3(b) of the said Act. The Act further provides in Section 3(f) that

No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Plaintiff could have avoided the 19½ per cent tax imposed by Section 3(b), and the irreparable injury complained of as resulting from the effort of defendant to collect said tax, by accepting the code and contesting the application of the Act to plaintiff before the National Bituminous Coal Commission and the courts pursuant to the procedure established by the Act, without prejudicing plaintiff in any way.

32. Plaintiff has paid the tax of one cent per ton imposed by Section 3(a) of the Bituminous Coal Act for the months of September and October, 1937, and has filed a claim for the refund of the said taxes with the Commissioner of Internal Revenue. Plaintiff could have secured and can secure a prompt determination as to whether or not the Commissioner would grant said refund, and if the refund were denied, the plaintiff could bring a proceeding in the

proper United States district court for recovery of said [fol. 32] refund, in which proceeding plaintiff could obtain a determination as to whether or not it is subject to the Bituminous Coal Act. Plaintiff can protect itself against being forced to pay the 19½ per cent tax imposed by Section 3(b); until such time as its status is finally determined, by accepting the code established by Section 4 of said Act.

33. Plaintiff is not entitled to enjoin the collection of taxes, in view of Section 3224 of the Revised Statutes (26 U. S. C. § 1543).

Wherefore, having fully answered the bill of complaint, the defendant prays that the relief therein sought be denied and that said bill be dismissed with costs to the plaintiff and that defendant have such further orders, decrees and relief as may be just and equitable in the premises.

(S.) Fred A. Isgrig, United States Attorney, Eastern District of Arkansas. (S.) Robert L. Stern, Special Assistant to the Attorney General. (S.) Milton Carr Ferguson, Special Assistant to the General Counsel, National Bituminous Coal Commission.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed June 3, 1938

Comes now the plaintiff herein by its attorneys, Henry Adamson and George O. Patterson, comes also the defendant herein, Homer M. Adkins, Collector of Internal Revenue, by Fred A. Isgrig, United States Attorney for the Eastern District of Arkansas, and this cause having been assigned now comes on to be heard. The case having been submitted upon the pleadings, stipulation and oral testimony and the Court being well and sufficiently advised on questions of law and fact arising herein, doth

Order, Adjudge and Decree that Homer M. Adkins, the Collector of Internal Revenue, should be and he is hereby enjoined and restrained from the collection of the excise tax

in the amount of nineteen and one-half per cent (19½%) as provided by Section 3(b) of the Bituminous Coal Act of 1937 heretofore assessed, and he is further restrained and enjoined from collecting or attempting to collect any excise tax or penalty which may be assessed pursuant to the said section of the Act.

This order shall remain in force and effect during the pendency of this litigation or until further orders of this Court.

Dated this 3rd day of June, 1938.

(Signed) J. D. Woodrough, Circuit Judge. (Signed) Heartsill Ragon, District Judge. (Signed) Thomas C. Trimble, District Judge.

[File endorsement omitted.]

[fol. 34] (Order granting leave to file supplement to answer omitted in printing.)

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENT TO ANSWER—Filed August 28, 1939

Comes now the defendant, and for supplement to his answer to the bill of complaint filed herein, respectfully states:

30-A. Exceptions to the proposed report of the Commission were filed by plaintiff, and on July 7, 1938, counsel for plaintiff argued the case orally before the Commission. On August 31, 1938, the Commission rendered an opinion and findings and issued an order denying plaintiff's application for exemption and declaring the coal produced by plaintiff to be subject to the Act. A copy of the Commission's decision and order is attached hereto as Exhibit A. Plaintiff thereupon petitioned the Circuit Court of Appeals for the Eighth Circuit to review the order of the Commission, pursuant to the provisions of Section 4-A and 6(b) of the Bituminous Coal Act. After argument, on June 19, 1939, that court affirmed the order of the Commission. The circuit court of appeals held that the Commission had jurisdic-

tion to make the order, and that the order was lawful and supported by substantial evidence. A petition for rehearing filed by plaintiff was denied. A copy of the opinion of the circuit court of appeals is attached hereto as Exhibit B.

[fol. 36] 30-B. This court has no jurisdiction to review the Commission's order holding that coal produced by plaintiff is subject to the Bituminous Coal Act inasmuch as (1) that Act vests in the circuit courts of appeals exclusive jurisdiction to review orders of the National Bituminous Coal Commission and deprives the district courts of jurisdiction to review such orders, (2) the circuit court of appeals has jurisdiction, which it has exercised upon plaintiff's petition, to review the Commission's order holding coal produced by plaintiff subject to the Act, and (3) plaintiff has an adequate and complete remedy at law under the statute.

30-C. In the alternative, if this court should have jurisdiction to determine whether coal produced by plaintiff is subject to the Bituminous Coal Act, the court is bound by the findings made by the Commission on that question unless such findings are arbitrary, capricious, or unsupported by substantial evidence. The findings made by the Commission in the instant case are not arbitrary, capricious, or unsupported by substantial evidence.

Respectfully submitted, (S.) Sam Rorex, United States Attorney for the Eastern District of Arkansas. (S.) Robert E. Sher, (S.) Robert L. Stern, Special Assistants to the Attorney General, Counsel for Defendant.

August 7, 1939.

Service of above acknowledged. No objection to filing but do not agree as to sufficiency.

(S.) Henry Adamson, Counsel for Plaintiff.

[fol. 37] In United States District Court

[Title omitted]

Motion to Strike Out Part of Defendant's Answer—Filed December 22, 1939

Comes now the plaintiff in the above entitled cause of action, and separately and severally moves the court to

strike out and reject from defendant's answer herein each of the following allegations of defendant's answer:

1. That part of defendant's original answer designated Paragraph No. 30.

2. That part of defendant's original answer designated Paragraph No. 31.

3. That part of defendant's original answer designated Paragraph No. 32.

4. That part of defendant's original answer designated Paragraph No. 33.

5. That part of defendant's first supplemental answer designated Paragraph No. 34.

6. That part of defendant's first supplemental answer designated Paragraph No. 35.

7. That part of defendant's first supplemental answer designated Paragraph No. 36.

8. That part of defendant's first supplemental answer designated Paragraph No. 37.

[fol. 38] 9. That part of defendant's second supplemental answer designated Paragraph 30-A.

10. That part of defendant's second supplemental answer designated Paragraph 30-B.

11. That part of defendant's second supplemental answer designated Paragraph 30-C.

For the reason that the matters and things alleged and contained in said paragraphs separately and severally considered are immaterial, impertenant and redundant and are insufficient to state a defense to plaintiff's cause of action herein.

Geo. O. Patterson, Henry Adamson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 39] (Order granting leave to file third paragraph of Complaint, omitted in printing.)

[fol. 40] IN UNITED STATES DISTRICT COURT

PARAGRAPH 3 OF COMPLAINT—Filed December 22, 1939

Comes now the plaintiff, and for third and further paragraph of complaint, complains of Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, and alleges and says:

1. That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville, Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. That this is an action in equity, and arises under the constitution and laws of the United States and under the laws of the United States providing for internal revenue, and in which there is an actual controversy between the plaintiff and the defendant in which the amount involved and in dispute exceeds the value of $3,000.00, exclusive of interest and costs.

3. This plaintiff repeats and re-alleges as part of this cause of action, each and all of the allegations contained in paragraphs 3, 4, 5, 6, 9, 10, 11, 12 and 13, of paragraph 1 of this complaint, with like effect as if herein fully repeated, and incorporates herein all of the facts therein set forth.

4. That this plaintiff has not subscribed to nor accepted the provisions of the code promulgated by the National Bituminous Coal Commission under and by virtue of the provisions of the Bituminous Coal Act of 1937, and is, therefore, not a code member and not subject to the application [fol. 41] of the conditions and provisions of the code as provided for in said act, or of the provisions of Section 4-A of said Act.

5. That said subsection (b) of Section 3 of said Bituminous Coal Act of 1937, as set out in paragraph 4 of the first paragraph of plaintiff's complaint herein, purports to levy a 19½% tax or penalty on the sale price or value of bituminous coal, which would be subject to the application of the conditions and provisions of the code provided for in Sec-

tion 4 of the Act, or of the provisions of Section 4-A of the act; that the coal produced and sold by plaintiff herein is not subject to the application of the conditions and provisions of said code, or of the provisions of Section 4-A, as provided in Section 4 and Section 4-A of the said Bituminous Coal Act of 1937; that the coal produced and sold by plaintiff is, therefore, not subject to the tax or penalty imposed by said subsection (b) of Section 3 of the Bituminous Coal Act of 1937.

Wherefore, plaintiff prays that defendant be enjoined from enforcing or attempting to enforce against this plaintiff the alleged liability for the so-called additional tax or penalty, and the alleged lien of the additional tax or penalty against the plaintiff's property, and for such other and further relief as plaintiff may be entitled to, conformable to the principles of equity and the practice of this court.

(S.) Geo. O. Patterson, Henry Adamson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 42] In United States District Court

Before Woodrough, Circuit Judge, and Trimble and Lemley, District Judges

Order Overruling Motion to Strike—Filed January 8, 1940

This cause having been submitted to the three-judge court on a motion of plaintiff to strike part of the answer and supplemental answer, and the court having considered the argument and briefs does deny and overrule the said motion in accordance with the opinion filed herewith.

(Signed) J. W. Woodrough, Thomas C. Trimble, Harry J. Lemley.

January 6, 1940.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas, Defendant

Before WOODROUGH, Circuit Judge, and TRIMBLE and LEMLEY, District Judges.

OPINION OVERRULING PLAINTIFF'S MOTION TO STRIKE PARTS OF ANSWER AND SUPPLEMENTARY ANSWER—Filed March 4, 1940.

This case has been submitted to the three-judge court on the motion of the plaintiff to strike out those parts of the defendant's answer and supplemental answer which set forth the proceedings of the National Bituminous Coal Commission in which it was determined by the Commission that the underlying coal in certain counties of Arkansas, including the coal produced by the plaintiff, is bituminous coal within the meaning of the Bituminous Coal Act of April 26, 1937, 15 U. S. C. S. Sec. 828 et seq. and that the plaintiff is not entitled to exemption from the operation and effect of the Act and the subsequent proceedings on the appeal from such determination to this court, reported in 105 F. (2d) 559, and the application for and denial of certiorari by the Supreme Court November 6, 1939. The plaintiff's petition has been amended so as to include expended allegations to the effect that the coal produced by it is not bituminous coal within the meaning of Section 17 (b) of the Act, and in support of its motion it presents that it is entitled in this suit to have this court consider its evidence in support of these allegations and render its own judgment upon the issues joined thereon. Its position is that this [fol. 44] court is not finally bound by the determination of the Commission or the decision of the Court of Appeals on the review in that court to find as a fact that plaintiff's coal is bituminous coal within the meaning of the Act.

This suit is in equity against the Collector of Internal Revenue to enjoin him from collecting from the plaintiff the "tax" of 19½ per cent upon gross sales of its coal production, imposed by Section 3 of the Act against producers of bituminous coal moving in interstate commerce who do not become members of the Code. The suit is independent of the proceedings before the Commission and the appeal in the Circuit Court of Appeals, and it is an appropriate suit to test the validity as to the plaintiff of the imposition upon it of the "tax" of 19½ per cent upon its gross sales of coal. In considering and passing upon the present motion therefore this court will confine itself entirely to the question whether or not the status of the plaintiff as a producer of bituminous coal within the definition of Section 17 of the Act has been finally settled against the plaintiff by the determination and decisions pleaded by defendant.

This court's jurisdiction is that of a District Court and it is bound to follow unreversed and unmodified decision by the Circuit Court of Appeals of the circuit. When we turn to that court's opinion in Sunshine Anthracite Coal Company v. National Bituminous Coal Commission, we note the Court's conclusion was that Congress had delegated to the Commission the jurisdiction to determine for all administrative purposes of the Act, what coals were and what coals were not within the definitions and purview of the Act.

[fol. 45] The issue of the Commission's jurisdiction was squarely presented by the petitioner for review which is the party plaintiff in this case, and was directly passed on and decided by the court. It was contended "that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines." It argues that "whether or not the coal it produces is bituminous, anthracite, semi-anthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the code."

In answer to that contention "the Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for

carrying out the provisions of the Act and (2) upon the power to grant exemptions under Section 4-A."

The Court of Appeals decided the issue and said, "We, think the grounds of jurisdiction relied upon by the Commission are fully sustained." Further on in the opinion, the court said: "Here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary deter- [fol. 46] mination." This court is bound to follow and apply the law so stated by the Circuit Court of Appeals.

But it is contended for the plaintiff, in support of the present motion, that its petition for review in the Circuit Court of Appeals was in an administrative proceeding in which such fact findings of the administrative body as were based upon substantial evidence were declared by the statute to be conclusive upon the court. The question whether plaintiff's coals are or are not bit minous is a question of fact and plaintiff asserts a right to the independent judgment of the court as to the fact.

The answer to the contention is that the Bituminous Coal Act, in conferring powers upon the Coal Commission and prescribing the duties to be performed by it, has made the discharge of many of the Commission's duties dependent upon its first making determination of the character of the underlying coals throughout the country and of the resultant status of those who produce the coals and engage in interstate commerce therein. The determination of the character of the coals could have been made by the Congress itself, or it could delegate the power. By the terms of the Act it conferred jurisdiction on the Commission to make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power [fol. 47] to make determination to some such national body as the Coal Commission and precluded committings it to the outcome of individual law suits in many courts.

It has not been decided whether the Collector may constitutionally enforce the collection of the "tax" of 19½

per cent against the plaintiff as provided in Section 3 of the Act, but the decision of the Court of Appeals that the Commission had jurisdiction to determine, and that it had rightly determined the status of the plaintiff as a producer of bituminous coal, necessarily implied that the determination was final and conclusive in the present suit. The decision of the Supreme Court in Shields v. Utah Idaho R. Co., 305 U. S. 177, permits of no other conclusion by this court.

In that case, the Utah Central Railroad Company sought to enjoin the United States District Attorney and the United States from enforcing against it certain penal statutes which were not applicable to interurban electric railways. The railroad company claimed to be exempt from the operation of the statutes on the ground that it was an interurban electric railway, but in proceedings had before the Interstate Commerce Commission to which it was a party, the Commission determined that it was not. There had been no court review of the Commission's determination and the railroad company contended that it was entitled to the independent judgment of the court on the fact issue. The Circuit Court of Appeals in the Tenth Circuit, held that it was so entitled, but on appeal the Supreme Court said:

"What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their em- [fol. 48] ployees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial de novo so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in United States v. Idaho, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (Id. p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S.

541, 547; Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88, 91; Virginia Railway Co. v. United States, 272 U. S. 658, 663; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 444; Florida v. United States, 292 U. S. 1, 12; St. Joseph Stock Yards Co. v. United States, supra.

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." Id.

It will be observed that the Supreme Court distinguished, as we must do here, between the fact question of character (or status) of the plaintiff in the suit for injunction which it had brought against the District Attorney, et al., and a question of constitutional right. We recognize fully that the plaintiff here, notwithstanding it is a producer of bituminous coal, has the right to contest payment of the 19½ per cent "tax" of Section 3 of the Act. Whether enforcement of that "tax" will or will not deprive it of constitutional rights remains to be litigated herein. But the Supreme Court has left no room to argue that this court has jurisdiction to try de novo the fact question as to the status of the plaintiff under the Coal Act or the character of the coal it produces.

[fol. 49] The Supreme Court's decision also precludes our reconsideration in this case of the evidence taken in the prior proceedings. That evidence was fully considered by the Circuit Court of Appeals and it was decided by that court that the Commission "in arriving at its determination had not departed from the applicable rules of law", and that "its findings had a basis in substantial evidence and were not arbitrary or capricious." Such is the full limit of judicial review of the fact findings of an administrative tribunal when made within the scope of its jurisdiction which the Supreme Court recognizes even in the absence of an express statute.

We think the Supreme Court's commitment to such support of administrative determinations of fact questions made within the powers lawfully delegated to them is also clearly shown in the other recent cases. Rochester Telephone Co. v. United States, 307 U. S. 125, 145; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 49; Anniston Mfg. Co. v. Davis, 301 U. S. 337.

The Bituminous Coal Act contains the express provision Section 6 (b) (d) that w-ere a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record and thereupon "such court shall have exclusive jurisdiction to affirm, modify and enforce or set aside (the order reviewed) in whole or in part." Section 6 (d) provides:

"(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Circuit Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive."

And in Section 6 (b), Congress provided that where a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record, and thereupon "such Court shall have exclusive jurisdic-[fol. 50] tion to affirm, modify, and enforce or set aside such order, in whole or in part." The contentions of plaintiff that the fact question has not been settled against it either because its present action is an independent one or because there was a different object in the prior proceedings or because those proceedings were for limited purposes, cannot be sustained.

As to the parties. Another contention of the plaintiff in support of the present motion is that the parties to the present suit are not the same as in the former proceedings in that here the Collector of Internal Revenue is defendant and there the Coal Commission was respondent to the petition for review in the Circuit Court of Appeals.

In considering this connection it is observed that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Collector) in respect to the "tax" of Section 3 of the Bituminous Coal Act threatened to be enforced against plaintiff are dependent upon the determination of the plain-

tiff's status by the Commission and the Court of Appeals. The Commission and the Court are given the exclusive power to make that determination and have exercised the jurisdiction. The "tax", if any is due or enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefor, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency [fol. 51] of the United States in official capacity, it is conclusive between the party and any other of the government authorized as an agency of the government in respect to the same matter. New Orleans v. Citizens Bank, 167 U. S. 371, 388-389; Bank of Kentucky v. Stone, 88 Fed. 384, 395 (C. C. D. Ky.), affirmed 174 U. S. 799; Gunter v. Atlantic Coast Line, 200 U. S. 273, 284 ff; Tait v. Western Maryland Ry. Co., 289 U. S. 620, 626-627.

In the case of Shields v. Utah Idaho R. Co., supra, from which we have quoted the situation in regard to the parties was the same as is here presented. There the United States District Attorney was the party defendant who threatened to take action against the plaintiff, as does the Collector in this suit. The injunction that was issued in the lower courts ran against the District Attorney. The fact that the Interstate Commerce Commission intervened in the case did not affect the situation. Although no question as to the identity of the parties to the estoppel of the Commission's determination was discussed by the Supreme Court, this court would not be at liberty to render decision at variance with that announced by the Supreme Court in the completely analogous situation.

We have given careful consideration to the earlier Supreme Court decisions cited and relied upon by plaintiff in support of its motion, including State Corporation Commission of Kansas v. Wichita Gas Co., 290 U. S. 561, 78 L. Ed. 500-504; B. & O. Ry. Co. v. United States, 298 U. S. 349, 80 L. Ed. 1209-1224; United Gas Public Service Co. v. Texas, [fol. 52] 303 U. S. 123, 82 L. Ed. 702-711; Crowell v. Benson, 285 U. S. 22, 76 L. Ed. 598; South Chicago Coal & Dock Co. v. Bassett, 104 F. (2d) 522-525 (C. C. A. 7); Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, 64 L. Ed. 908-914. It

ay be conceded that different views ha e been expressed
s to the effect to be given in the courts to the determinations
f administrative bodies under the varying circumstances
resented in the adjudicated cases. No good purpose would
e served by attempting a review of them in this opinion.
one of those referred to would justify a refusal to follow
ose late decisions upon which we have relied.

We conclude that the plaintiff's motion to strike out
ne parts of defendant's and supplemental answer referred
o in the motion should be denied and we so order.

Upon the pleadings now presented the finding of the court
ould be that the plaintiff was a producer of bituminous
al within the meaning of the Act at the times in the peti-
on referred to, and the court would receive no testimony
ffered to the contrary.

But our ruling on the motion is made with full recogni-
on of the right of the plaintiff to litigate the issues as to
ne validity or application of the statutory provisions con-
erning the "tax" or the rights which the plaintiff as a non-
de member producer of bituminous may have in regard
o the same.

[File endorsement omitted.]

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fols. 53-54] In United States District Court

Supplemental Answer—Filed Feb. 5, 1940

Comes now the defendant, Homer M. Adkins, Collector
f Internal Revenue for the District of Arkansas, and for
nswer to the third part of the bill of complaint respect-
lly states:

1. Defendant admits the allegations of paragraph 1 of
art 3 of the bill of complaint.

2. Defendant admits the allegations of paragraph 2 of
art 3 of the bill of complaint.

3. Defendants repeats and re-alleges all of the allegations
ontained in the answer heretofore filed in response to
aragraphs 3, 4, 5, 6, 9, 10, 11, 12, and 13 of Part 1 of the
mplaint, with like effect as if herein fully repeated.

4. In answer to paragraph 4, defendant admits that plaintiff has not subscribed to nor accepted the provisions of the Bituminous Coal Code. Defendant avers that he is not required to make answer to the remaining allegations of this paragraph, which are conclusions of law.

5. In answer to paragraph 5, defendant avers that he is not required to make answer to this paragraph, which contains only conclusions of law.

Wherefore, defendant prays that the relief sought in the bill of complaint be denied and that said bill be dismissed with costs to plaintiff and that defendant have such further orders, decrees, and relief as may be just and equitable in the premises.

(Signed) Robert E. Sher, (Signed) Robert L. Stern, (Signed) Harold Leventhal.

[File endorsement omitted.]

[fol. 55] In United States District Court, Eastern District of Arkansas, Western Division

In Equity No. 2949

The Sunshine Anthracite Coal Company, Plaintiff,

vs.

Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, Defendant

Memorandum Opinion—Filed Feb. 16, 1940

The Court:

We have concluded to avoid the delay that would be entailed by the preparation of a formal opinion in this case, notwithstanding the great importance of the questions presented, because of the comprehensive discussions and analyses of the Bituminous Coal Act and the Act preceding it promulgated in the Carter Coal Company case and in the City of Atlanta vs. Commissioner. We are in accord with the opinion in the latter case and the citations generally control the decision here except as to the specific matter of the 19½ per cent tax of Section 3 (b).

We feel that in this case that we had the benefit of an unusually helpful oral argument in that it seems that the vital and determinative questions were clearly presented and with immediate reference to the decided cases that tended to sustain the various contentions that were made.

Now, we have had submitted to us the proposed and requested findings, we have carefully gone over those requested by the plaintiff and in our determination of the case we find no one of these requested findings that are necessary to sustain the conclusions we have arrived at, or necessary to reflect the testimony in the case. There are some that are incorporated in the findings which we shall adopt and we see no occasion for repetition. All the essential matter that we find should be determined upon the testimony we think is included and properly set forth in the findings that have been submitted on behalf of the defendant together with those additional findings which we have made ourselves. On carefully checking over and exam- [fol. 56] ining the proposed findings for the Government, we have made some addition and corrections particularly as to the matter of the state of the plaintiff's property and the value of its assets, etc. The plaintiff has not requested specific detailed findings in that regard, nor do we think it necessary to amplify the matter very much. It has been requested that we find that the plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff, under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed but not less than $5,000.00 per year. By a supplemental agreement, the royalty has been reduced to fifteen cents a ton while the mine is in the development stage, the minimum royalty still continuing at $5,000.00 per year. And that part of the finding appears to us to be properly in accord with the allegations and the testimony.

The plaintiff's property is in the development stage at the present time. The tonnage produced and sold has been increased from year to year. In 1939 it was in excess of one hundred thousand tons. There may be a slight inaccuracy in that. There was testimony that between 1937 and 1938 there had not been very much change. The property of the plaintiff is carried on its books at a figure in excess of $500,000.00 but it is very heavily encumbered. In

part, because of the depressed condition of the bituminous coal industry, plaintiff is unable at present to find a purchaser for its property in a free and open market or to borrow money thereon from the bank. And then we have the fact that plaintiff's property has been operated at a loss for the past three years and the actual sale value of its property does not exceed $30,000.00. Now there were [fol. 57] further findings including a finding of the formal matters on which there has been no controversy as to amount of taxes which the defendant has assumed and purported to lay against plaintiff and the dates, manner and so forth, and that the production has continued. The historical matter copied in the stipulation as to the state of the industry has been repeated in the findings; we find that substantially correct except one request was made by the Government for us to find, "That another effect of the situation was that the operators wasted the best of the nation's coal reserve because they were cheap and readily available." We find no testimony directed to that point exactly and we decline to make that finding. Otherwise, the formal matters in the finding are in direct conformity, we think, with the evidence. There is a finding of the effect of the proceedings that have been had before the Commission and before the Appellate Court, as to which we have already indicated, our opinion in writing and the finding here correctly recites the facts of those proceedings.

As to our conclusions of law, we make the formal jurisdictional conclusions. We have a certain jurisdiction, but we do not have jurisdiction to go into the questions already adjudicated by the Commission and by the Court of Appeals. We conclude that the Act is constitutional, that the regulatory provisions are valid exercises of the power of Congress to regulate commerce, that the procedure for the establishment of prices is within the Constitutional power and sufficient definite standards are indicated. We do not pass on the question of nomenclature of the section that is sought to be given by the plaintiff whether this is a tax or a penalty, but we find it is germane to and adapted to carrying out the purpose of the Act and within the scope of the power of Congress to enact. Now, outside of these [fol. 58] findings that have been requested, we have made this finding which is directly, particularly directed to the final order that ought to be entered in this case. It appears

to us from the record that the coal company filed its claim for exemption August 31, 1938. The Circuit Court of Appeals affirmed by opinion June 19, 1939. The Supreme Court denied certiorari November 6, 1939. Rehearing was denied by the Supreme Court December 4, 1939. Throughout the period no schedule of prices had been established by the District Board.

The statute Sec. 4-A Paragraph 2 (p. 13) provides that the filing of an application in good faith "shall exempt the applicant from any obligation, duty or liability imposed by Section 4 with respect to the commerce until such time as the Commission shall act upon the application". The exemption may be suspended if there is reason to believe that the exemption during the litigation "is likely to permit evasion of the Act" id.

So-called taxes and penalties were attempted to be applied to plaintiff beginning in March, 1938, and running through September, 1939. Although the statute describes the exemption period by reason of the presentation of application for exemption in good faith as extending to the time when the Commission "shall act" thereon, the extent of such exemption is also qualified by exercise of discretion when it appears "likely to permit evasion of the Act". The test may fairly be said to be the likelihood of such evasion. The due process for protection of plaintiff's rights is accorded by the opportunity for hearing before the Commission and the hearing by the Court of Appeals on appeal. Together, the procedure before the Commission and the court satisfies the due process requirements. We conclude that the discretion vested in the Commission by necessary [fol. 59] implication also resides in the court. We think that plaintiff's claim for exemption has been made and diligently prosecuted without delay in good faith and that in view of the fact that no price schedule has been established the plaintiff was in this case entitled to be exempted from the 19½ per cent exaction of the statute until the final action of the Supreme Court denying rehearing on its ruling on certiorari on December 4, 1939. As to the taxes laid and attempted to be collected by defendant under the 19½ per centum provision of the Act prior to said date of December 4, 1939, therefore, the plaintiff is entitled to the injunction prayed for. It is decreed that such taxes up to that time are null and void and their assertion or collection is enjoined."

But from and after said date plaintiff has ceased to be exempt by reason of its application for exemption and litigation in support of such claim. Its bill in equity herein seeking to enjoin defendant from assessing and collecting the amount of 1½ per centum of the sale price of its coals from and after December 4, 1939, is without equity and is dismissed.

But notwithstanding such dismissal, the restraining order heretofore entered herein shall remain operative to prevent assertion or collection of such taxes by defendant for the period of thirty days from the entry hereof to enable the plaintiff to appeal to the Supreme Court. If the plaintiff shall perfect such appeal in said court within said period, the restraining order shall remain in force and shall operate to stay our decree until final disposition of the appeal in the Supreme Court; otherwise it shall cease to be operative and shall stand revoked at the end of said thirty day period.

Now that seems to us sufficient basis for the clerk to enter a decree in conformity with our decision.

[File endorsement omitted.]

[fol. 60] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 61] In United States District Court

Findings of Fact and Conclusions of Law—Filed February 16, 1940

This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the court now files herein its findings of fact and conclusions of law thereon.

Findings of Fact

1. Plaintiff, The Sunshine Anthracite Coal Company, is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business in Clarksville,

Johnson County, State of Arkansas, and is engaged in the business of mining and shipping coal.

2. The defendant, Homer M. Adkins, is the duly appointed, qualified and acting Collector of Internal Revenue for the District of Arkansas, and as such Collector, collects all taxes, assessments and levies made or demanded to be made by the United States of America, which are collectible in Arkansas through the Internal Revenue Department.

3. Plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed, but not less than $5,000 per year. By a supplemental agreement the royalty has been reduced to fifteen cents per ton while the mine is in the development [fol. 62] stage, the minimum royalty still continuing at $5,000 per year.

4. Plaintiff's property is in the development stage at the present time. The tonnage produced and sold in 1939 was in excess of 100,000 tons. The property of plaintiff is carried on its books at a figure in excess of $500,000, but is heavily incumbered. In part because of the depressed condition of the bituminous coal industry, plaintiff is unable at present to find a purchaser for its property in a free and open market or to borrow money thereon from the banks.

4-A. Plaintiff's property has been operated at a loss for the past three years and the actual value of its properties is not to exceed $30,000.00.

5. Practically the entire output of the coal produced by the plaintiff at its mine in Arkansas is sold to purchasers outside the State of Arkansas.

6. Plaintiff has not subscribed to or accepted the provisions of the Bituminous Coal Code provided for in Section 4 of the Bituminous Coal Act of (April 26) 1937, c. 127, 75th Cong., 1st Sess. 50 Stat. 72 et seq., 15 U. S. C., Sec. 828 et seq.

7. The defendant served notice and demand for taxes on the plaintiff on May 3, 1938, in the amount of $14,031.37, $532.14 penalty, and $186.23 interest, totaling $14,749.64. Defendant, on May 5, 1938, filed in the Office of the Circuit

Clerk and Recorder of Johnson County, Clarksville, Arkansas, Notice of Tax Lien under the Internal Revenue Laws, [fol. 63] in the total amount of $15,488.62. As to the end of September, 1939, additional taxes in the amount of $54,610.56 have been assessed against plaintiff. All of the taxes mentioned were levied and assessed under and by virtue of Section 3 (b) of the Bituminous Coal Act of 1937.

8. Since the date of passage of the Bituminous Coal Act of 1937, plaintiff has continuously produced coal and sold it in interstate commerce, without either joining the Code, or paying any tax under Section 3 (b); it has refused and continues to refuse to pay such taxes or any part thereof.

9. On August 31, 1937, Sunshine Anthracite Coal Company, plaintiff herein, and hereafter referred to as Sunshine, filed with the National Bituminous Coal Commission, established pursuant to Section 2 (a) of the Bituminous Coal Act of 1937, an application for exemption on the ground that its coal was not "bituminous coal" within the meaning of Section 17(b) of the Act. This was filed pursuant to the Commission's Order No. 28, dated July 27, 1937, providing a procedure whereby producers might secure a determination whether their coal is subject to the Act. In September 24, 1937, the Commission issued its Order No. 53, directing that a hearing be held before an examiner of the Commission in Fort Smith, Arkansas, on October 4, 1937, for the purpose of determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Act, and for the further purpose of hearing applications for exemption, including that filed by Sunshine. Upon due notice, a hearing was held before the Examiner, and Sunshine introduced [fol. 64] evidence in support of its claim that its coal was not "bituminous coal," within the meaning of the Act. After hearing Sunshine's evidence, and evidence to the contrary, the Examiner filed a report recommending a disallowance of Sunshine's application. The Commission issued a proposed report to which Sunshine filed exceptions and the Commission heard oral argument thereon. On August 31, 1938, the Commission rendered an opinion, accompanied by its findings of fact and conclusions of law, and entered an order denying Sunshine's application for exemption.

10. On October 10, 1938, pursuant to Section 6(b) of the Act, Sunshine filed in the United States Circuit Court of

Appeals for the Eighth Circuit a petition for review of the Commission's order of August 31, 1938, mentioned above, praying that said order be set aside. On June 19, 1939, after argument, that court affirmed the order of the Commission. The Circuit Court of Appeals held that Sunshine had been accorded a full, fair and impartial hearing by the Commission, that the findings were based on substantial evidence, and that the order complained of was within the Commission's jurisdiction. Sunshine filed a petition for rehearing, which was denied July 8, 1939. On August 8, 1939, the court entered an order substituting Harold L. Ickes, Secretary of the Interior, and Howard A. Gray, Director of the Bituminous Coal Division of the Department of the Interior as parties respondent in place of the National Bituminous Coal Commission.

On September 23, 1939, Sunshine filed a petition for a writ of certiorari in the United States Supreme Court. On November 6, 1939, this petition was denied. A petition for rehearing was denied by the Supreme Court on December 4, 1939.

[fol. 65] 11. The question determined in the proceeding described in paragraph 10 is identical with the question presented in "paragraph one" of the complaint filed in this case, namely, whether the coal produced by Sunshine is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Hence, the judgment in that case is conclusive of that issue here.

12. Bituminous coal is the nation's primary source of energy. Its use is vital to the public welfare. It supplies about 75 per cent of the energy used by public utilities and in manufacturing. It is essential to the industrial life of the nation and furnishes a great part of the fuel used for household heating. It is of great importance to transportation. It furnishes about 83 per cent of the fuel used by locomotives operating on the railways. Over a period of years the amount of coal transported by the railroads has ranged from 26 to 33 per cent of their total freight and has furnished from 16 to 19 per cent of the total revenues of the carriers.

13. In recent years, due largely to over-expansion of the industry during the World War, to competition from other fuels, and to increased efficience in the use of fuel, the amount

of soft coal consumed has markedly declined. Even before the war, there had been an excess of capacity over demand, and the diminution accentuated the overcapacity.

14. Because of the high cost of temporarily shutting down a mine, due to the need for physical repairs, taxes and royalties, operators will continue to operate although the price of coal is below the cost of production. In view of the [fol. 66] relatively high overhead costs in the operation of a mine, each operator endeavors to increase his production so long as coal can be sold above actual out-of-pocket costs. There is thus a tendency to reduce prices in order to attain sufficient orders to keep the mine running at full capacity.

15. As a result of the facts stated in the preceding paragraph, capacity does not readily adjust itself to decreasing demand despite great reduction in price. As prices drop, each producer seeks only to increase his individual production so that he may survive. The overproduction has caused a bitter struggle for markets and merciless cut-throat price-cutting competition. Since 1924, the average price realized by producers of bituminous coal throughout the United States has generally been far less than the average of production. "Prices had been cut so low that profit had become impossible for all except the lucky handful."

16. These circumstances have been aggravated by factors peculiar to the coal industry. Consumers generally specify coal of particular sizes. The coal comes out of the mines in various sizes, and since it is uneconomical to store coal and mines generally do not have storage facilities, all of the coal, including unsold sizes, is immediately loaded into railroad cars at the mine. In order to avoid congestion at mine tracks, the unsold sizes are often consigned to some market, and then, to avoid mounting demurrage charges, producers are under pressure to slash prices.

17. The average price of coal dropped from $2.68 per ton in 1923 to $1.78 in 1929 (during which period prices were generally quite stable), and to $1.31 in 1932. From 1923 to [fol. 67] 1929, the number of mines decreased about 3,300, a decrease of approximately 30 per cent. "Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling." Fi-

nancial distress among operators, intense poverty among miners and the business and professional population dependent upon the mining industry, has pervaded even during periods of general prosperity.

Conclusions of Law

1. This case involves a controversy arising under the Constitution and laws of the United States. The amount in controversy exceeds the sum of $3,000, exclusive of interest and costs.

2. This court has jurisdiction as a court of equity.

3. This court has no jurisdiction to determine whether plaintiff's coal is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Under Section 4-A and Section 6 of the Act, the findings and order to be "bituminous coal" within the meaning of the Act was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

4. In any event, the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission [fol. 68] denied plaintiff's application for exemption from the Act. The Circuit Court of Appeals affirmed the Commission's order, and the Supreme Court denied a writ of certiorari.

5. Section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

6. The Bituminous Coal Act of 1937, C. 127, 75th Congress, 1st Session, 50 Stat. 72, is constitutional;

(a) The regulatory provisions in Section 4 are a valid exercise of the power of Congress to regulare interstate commerce and intrastate commerce directly affecting interstate commerce.

(b) The establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable and is related

to a proper Congressional purpose and does not violate the Fifth Amendment.

(c) The standards of the Act are sufficiently definite and the Act contains no invalid delegation of legislative authority.

(d) Whether or not the taxing provisions of Section 3(b) could be otherwise sustained, since the regulatory provisions of the Act are valid, the taxing provisions of the Act are likewise valid as effecting the valid regulatory purpose of the Act.

(e) The exemption from the tax imposed by Section 3(b), of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of Section 4, does not constitute an arbitrary classification contravening [fol. 69] the Fifth Amendment.

7. The bill of complaint should be dismissed.

(Signed) J. W. Woodrough, U. S. Circuit Judge.
(Signed) Thomas C. Trimble, Harry J. Lemley, U. S. District Judges.

[File endorsement omitted.]

[fol. 70] IN UNITED STATES DISTRICT COURT

DECREE—Filed February 16, 1940

This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the Court now files herein its findings of fact and conclusions of law thereon, and the Court now renders judgment as follows:

It is hereby ordered, adjudged and decreed that the defendant be and he is hereby permanently enjoined from collecting or attempting to collect taxes and penalties laid and accrued against plaintiff by defendant under Section 3(b) of the Bituminous Coal Act of 1937, same being the tax of 19½ per centum of the same price of plaintiff's coal, up to and including date of December 4, 1939.

It is further ordered, adjudged and decreed that as to taxes accrued or assessed against plaintiff under Section

3(b) of said Act from and after date of December 4, 1939, plaintiff's bill is without equity and the same is hereby dismissed.

It is further ordered, adjudged and decreed by the Court that notwithstanding the dismissal of said bill, the restraining order heretofore issued against defendant restraining him from collecting or attempting to collect taxes asserted against plaintiff under Section 3(b) of said Bituminous Coal Act of 1937, be and the same is hereby continued in full force and effect as to such taxes assessed and accruing from and after December 4, 1939, for the period of thirty (30) days from entry of this decree to enable plaintiff to appeal to the Supreme Court of the United States, and that if such appeal be perfected within said thirty (30) day period, said restraining order against the defendant shall [fols. 71-74] remain in full force and effect until final disposition of said appeal by said Supreme Court of the United States; otherwise, it shall cease to be operative and shall stand revoked at the end of said thirty (30) day period.

Signed and dated at Little Rock, Arkansas, this 16th day of February, 1940.

(Signed) J. W. Woodrough, U. S. Circuit Judge.
(Signed) Thomas C. Trimble, (Signed) Harry J. Lemley, U. S. District Judges.

[File endorsement omitted.]

[fol. 75] In United States District Court for the Western Division of the Eastern District of Arkansas

The Sunshine Anthracite Coal Company, a Corporation, Plaintiff,

vs.

Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, Defendant

Statement of Evidence

Be it Remembered, that on this, the 15th day of February, 1940, this cause coming on to be heard before the Honorable Joseph W. Woodrough, United States Circuit Judge, and the Honorable Thomas C. Trimble and the Honorable Harry

J. Lemley, United States District Judges, the plaintiff appearing and being represented by Messrs. Adamson, Blair and Adamson, of Terre Haute, Indiana, and Messrs. Patterson and Patterson, of Clarksville, Arkansas, and the defendant appearing and being present by Mr. Sam Rorex, United States Attorney, Mr. Leon B. Catlett, Assistant United States Attorney, Mr. Robert Sher, Assistant United States Attorney General, and Mr. Harold Leventhal, Assistant United States Attorney General appearing for the defendant and for the National Bituminous Coal Commission, and Messrs. Harper and Harper, of Fort Smith, Arkan- [fol. 76] sas, appearing for District #14 of the National Bituminous Coal Commission, when among other things, the following proceedings were had:

* * * * * * *

[fol. 77] George A. Merchant, was sworn as a witness on behalf of the plaintiff, and testified as follows on

Direct examination.

Questions by Mr. Henry Adamson:

Q. State your name and residence to the Court.

A. George A. Merchant, Chicago, Illinois.

Q. What official position, if any, do you occupy with the Sunshine Anthracite Coal Company?

A. Secretary and treasurer.

Q. Are the books of the Sunshine Anthracite Coal Company kept under your supervision and control?

A. They are.

Q. I will ask you if you have with you the balance sheets and operating statements of the Sunshine Anthracite Company?

A. I have.

Q. Let me have them, if you please. (Takes them.)

Mr. Adamson: We will ask the Reporter to make them plaintiff's exhibit number one.

The above documents marked for identification as exhibit number one (Plaintiff), and are in words and figures as follows:

Plaintiff's Exhibit Number One

[fol. 78]

Sunshine Anthracite Coal Company

Operating Statement

December 1939

	Current Month			Jan. 1, 1939 to Dec. 31, 1939		
	Tons	Amount	Per Ton	Tons	Amount	Per Ton
Coal Sales—Car Loads	10,710.60	27,074.17	2.5278	104,479.10	257,058.15	2.4604
Inventory—End of Period	838.00	2,907.75	3.4799	838.00	2,907.75	3.4799
	11,548.60	29,981.92	2.5962	105,317.10	259,965.90	2.4684
Inventory—Beginning of Period	1,260.00	3,280.00	2.6032	578.00	1,280.50	2.2153
	10,288.60	26,701.92	2.5953	104,739.10	258,685.40	2.4698
Less: Commission on Coal Sales		3,509.87	.3412		32,047.25	.3060
Realization		23,192.05	2.2541		226,638.15	2.1638
Less: Operating, General & Administrative expense		27,147.74	2.6386		230,418.94	2.1999
Operating Profit or Loss		3,955.69	.3845		3,780.79	.0361
Plus: Other Income: Miscellaneous		.....	.....		241.40	.0023
Net Profit or Loss	(in red)	3,955.69	.3845	(In red)	3,539.39	.0338

Plaintiff's Exhibit Number One—Continued

[fol. 79]

Sunshine Anthracite Coal Company

Cost Statement—Sunshine Mine

December—1939

Current Month—10,288.60

1-1-39 to 12-31-39
104,739.10 Tons

	Labor		Supplies		Labor & Supplies		Labor & Supplies	
	Amount	Per Ton	Amount	Per Ton	Amount	Per Ton	Amount	Per Ton
Bottom—Operating Labor & Supplies:								
Hand Loading	5,559.55	.5404			5,559.55	.5404	40,192.31	.3837
Mining	765.40	.0744	119.57	.0116	884.97	.0860	11,136.25	.1063
Joy Loaders							4,401.83	.0420
Conveying	508.92	.0495	25.48	.0025	534.40	.0520	9,547.07	.0912
Shooting and Drilling	629.51	.0611	741.33	.0721	1,370.84	.1332	16,037.67	.1531
Ventilation	257.87	.0251	8.91	.0008	266.78	.0259	4,149.04	.0396
Timbering			932.59	.0906	932.59	.0906	8,010.85	.0765
Drainage	69.28	.0067	9.39	.0009	78.67	.0076	1,063.97	.0101
Power			693.91	.0674	693.91	.0674	7,769.39	.0742
Supervision	1,254.83	.1219	99.00	.0097	1,353.83	.1316	11,100.07	.1060
Engineering							8.45	.0001
Electrician and Helper	207.66	.0202			207.66	.0202	2,082.98	.0199
Supplymen	524.33	.0510	22.73	.0022	547.06	.0532	8,406.28	.0803
Rock Loading	300.00	.0292			300.00	.0292	2,147.11	.0205
Miscellaneous			4.28	.0004	4.28	.0004	1,607.63	.0153
Bottom—Operating Labor & Supplies	10,077.35	.9795	2,657.19	.2582	12,734.54	1.2377	127,660.90	1.2188
Bottom—Maintenance:								
Mining Machines	244.30	.0238	1,316.65	.1279	1,561.05	.1517	6,131.29	.0585
Joy Loaders							3,772.99	.0360
Conveying Equipment	108.35	.0105	1,351.61	.1314	1,459.96	.1419	4,919.85	.0470
Electrical Equipment			133.59	.0130	133.59	.0130	2,240.66	.0214
Bottom—Maintenance	352.75	.0343	2,801.85	.2723	3,154.60	.3066	17,064.79	.1629
Top—Labor & Supplies:								
Tipple	539.94	.0525	5.02	.0005	544.96	.0530	4,817.53	.0460
Preparation	939.05	.0913			939.05	.0913	9,131.36	.0872
Shop	192.66	.0187	49.95	.0049	242.61	.0236	3,036.53	.0290
Building Repairs							113.56	.0011
Supervision	644.77	.0627	72.20	.0070	716.97	.0697	9,377.09	.0895
Mine Office	356.74	.0347	84.91	.0034	391.65	.0381	3,312.02	.0316
Watchman	103.81	.0101			103.81	.0101	935.36	.0089
Wash House Attendant							37.65	.0004
Miscellaneous	70.45	.0068	8.56	.0008	79.01	.0076	548.39	.0052
Company Car Expense			43.04	.0042	43.04	.0042	600.62	.0057
Miscellaneous Petty Expense			151.36	.0147	151.36	.0147	729.52	.0070
Supply Men	195.57	.0190			195.57	.0190	2,689.91	.0257
Gob Handling	111.62	.0108			111.62	.0108	1,014.50	.0097
Box Car Loader							406.02	.0039
Reciprocating Feeder & Storage Bin	54.66	.0053	10.78	.0011	65.44	.0064	2,459.63	.0235
Top—Labor & Supplies	3,209.27	.3119	375.82	.0366	3,585.09	.3485	39,209.69	.3744
Total Labor & Supplies	13,639.37	1.3257	5,834.86	.5671	19,474.23	1.8928	183,935.38	1.7561
General Expense:								
Insurance—General					144.66	.0141	1,771.67	.0169
Insurance—Compensation					830.71	.0807	8,213.03	.0784
Taxes—State					167.63	.0163	1,348.87	.0129
Taxes—Social Security & Unemployment Insurance					526.06	.0511	5,067.97	.0484
Royalties					1,543.29	.0500	15,710.89	.1500
Total General Expense					3,212.35	.3122	32,112.43	.3066
Administrative Expense								
General Sales Expense					81.81	.0080	1,107.17	.0106
Legal Expense					3,828.65	.3721	6,817.02	.0651
Association Dues					130.13	.0126	740.34	.0071
Chicago Office Expense					250.00	.0243	3,000.00	.0286
Interest Expense					170.57	.0166	2,643.76	.0252
Miscellaneous Expense							62.84	.0006
Total Administrative Expense					4,461.16	.4336	14,371.13	.1372
Total Operating, General & Administrative Expense					27,147.74	2.6386	230,418.94	2.1999

Plaintiff's Exhibit Number One—Continued

[fol. 80]

Sunshine Anthracite Coal Company

Balance Sheet

December 31, 1939

	December 31 1939	November 30 1939	Increase–B Decrease–R
Assets:			
Fixed Assets:			
Plant and Equipment (Since 7/1/37)	175,133.46	175,133.46	
Development – New Slope Mine	41,308.00	41,308.00	
Machinery and Equipment	111,214.92	111,214.92	
Lease Hold	168,000.00	168,000.00	
Building	2,850.00	2,850.00	
Land	3,500.00	3,500.00	
Furniture & Fixtures	207.00	207.00	
Automobile	665.00	665.00	
	502,878.38	502,878.38	
Current Assets:			
Cash	451.22	573.98	122.76 (in red)
Accounts Receivable	178.57	78.57	100.00
Inventories	4,924.22	5,516.93	592.71 (in red)
	5,554.01	6,169.48	615.47 (in red)
Deferred Assets:			
Prepaid Insurance	1,365.23	1,551.58	186.35 (in red)
Advance Royalty	1,543.29 (in red)	1,951.91 (in red)	408.62
Miscellaneous	2,622.52	2,495.28	127.24
	2,444.46	2,094.95	349.51
Total Assets	510,876.85	511,142.81	265.96 (in red)

[fol. 81]

Sunshine Anthracite Coal Company

Balance Sheet

December 31, 1939

	December 31 1939	November 30 1939	Increase–B Decrease–R
Liabilities:			
Current Liabilities:			
Accounts Payable:			
Trade Creditors	20,867.11	22,052.32	1,185.21 (in red)
Binkley Coal Company	242,495.20	239,222.87	3,272.33
Notes Payable:			
Due 90 days	7,250.00	7,250.00	
Long Term	37,415.25	39,415.25	2,000.00 (in red)
Accrued Payroll	8,667.04	6,138.04	2,529.00
Accrued Interest Notes Payable	1,628.03	1,557.46	70.57
Accrued Taxes	2,801.41	2,106.39	695.02
	321,124.04	317,742.33	3,381.71
Reserves:			
For Compensation Insurance	3,985.05	3,677.03	308.02
Capital & Surplus:			
Capital Stock	10,000.00	10,000.00	
Surplus	71,650.69 (in red)	67,674.91 (in red)	3,955.69 (in red)
Paid in Surplus	247,398.36	247,398.36	
	185,767.76	189,723.45	3,955.69 (in red)
Total Liabilities	510,876.85	511,142.81	265.96 (in red)

[fol. 82] Mr. Adamson:

Q. Now, Mr. Merchant, where did you get the information that goes on the books of the Sunshine Anthracite Coal Company—First, where are the books kept that are in question?

A. Chicago, Illinois.

Q. That is the general books?

A. That is right.

Q. Where do you get the information that goes on the books of the Sunshine Anthracite Coal Company?

A. From the main office, which is located at Clarksville, Arkansas.

Q. You did not keep the set of books at Clarksville?

A. Not the general books.

Q. What do you keep at Clarksville?

A. Pay rolls, cost figures, and supply accounts.

Q. Now, how do those figures get on the general books of the corporation?

A. From the records transmitted from Clarksville.

Q. This is a balance sheet and operating statement for the calendar year of 1939, is it not?

A. That is right.

Mr. Adamson: We offer in evidence the balance sheet and operating statement of the Sunshine Anthracite Coal Company for the year 1939. The record will show admitted and read in evidence?

[fol. 83] The Court: Yes, the record will show admitted and read in evidence.

Exhibit Number One

The above documents admitted in evidence and read to the Court, and are in words and figures as heretofore shown herein.

Mr. Adamson:

Q. Mr. Merchant, how long have you been engaged in the coal mining business?

A. Since 1914.

Q. You are acquainted with the properties of the Sunshine Anthracite Coal Company?

A. Yes sir.

Q. All of the property and assets of the Sunshine Anthracite Coal Company are included in these balance sheets?

A. They are.

Q. I will ask you to state to the Court what in your opinion would be the amount that could be borrowed from a bank or lending agency on the security of the Sunshine Anthracite Coal Company property and assets.

The Court: You mean in that year or at the present time?

[fol. 84] Mr. Adamson: I mean at the present time.

The Court: At the present time?

Mr. Adamson: At the present time.

The Court: Just so I understood that.

Mr. Adamson: Yes sir.

A. Well, that would be a rather difficult question, but I do not think that any bank would lend anything, coal properties are not very highly regarded from a banking standpoint and the lending of money.

Q. What, if any, value would it have for sales purposes on the present market?

Mr. Sher (Interrupting): Just a minute, Mr. Merchant, are you familiar with the general market value of coal properties throughout the United States?

A. Well, I think I am.

Q. Have you been devoting your activities solely to acting as bookkeeper or auditor of the coal company, or have you been actively engaged in the appraising of properties for sale?

[fol. 85] A. I have not been engaged in the appraising of properties; I have looked over various properties from the viewpoint of purchasing them, and I have spent about eight years in operations.

Q. How long ago was that?

A. That was started in 1924 and until 1932.

Q. How long is it since you have been looking at properties from the standpoint of purchasing?

A. Well, I looked over property in Indiana about five years ago.

Q. You have not done any of that since?

A. I don't recall having looked over one since.

Mr. Sher: I think I will have to object to any testimony by this witness. He has not appraised any properties for the purpose of sale or looked at any properties, I don't think he is a competent witness on that point.

Mr. Adamson: That simply goes to the weight to be given to his testimony.

The Court: Do you think the owner of the property is not able to give the value or does it come within that——

[fol. 86] Mr. Adamson: I think on matters of general knowledge of that kind, anybody can give an opinion. There may be some question as to the weight.

The Court: Is it expected to show it has great value?

Mr. Adamson: No, they—They seem to have the theory that we could pay all these taxes and still continue to operate, and we alleged in the complaint that we couldn't do that, and we want to follow the formal allegations of the complaint.

The Court: The purpose is to show it has a small value?

Mr. Adamson: The purpose is to show that we could not beg, borrow or steal money enough to pay the nineteen and one half percentum.

The Court: Is it not, generally speaking, it is within the issues affected by your pleadings?

Mr. Sher: Oh yes, it is in the issue, but the only question I raised is whether this witness himself has the knowledge to testify to coal values.

[fol. 87] The Court: That goes to the value?

Mr. Adamson: That is correct, for the purpose of informing the Court as to the whole situation, in an equity suit. (Here the Court confers among themselves.)

The Court: The objection will be overruled, and the testimony will be received for what it may be worth.

A. Well, it is my opinion that that property, from a sale value——

Mr. Sher: What was the answer?

The Reporter: (Reads.)

A. Would be only worth what might be received from the sale of the equipment which is on the property.

Q. Now, can you give us an approximation on that, Mr. Merchant?

A. Well, that equipment should bring twenty five to thirty thousand dollars at re-sale.

Q. Now, Mr. Merchant, I will hand you plaintiff's exhibit number one. During the year 1939, what were the results of the operation of the mine of the Sunshine Anthracite Coal Company?

A. There was a net operating loss of $3,539.39.

[fol. 88] Q. Will you explain more fully what you mean by "net operating loss"?

A. Yes sir.

Q. A little louder, please.

A. That is a loss which represents the difference between the amount received for all coal sold and the amount of actual labor, supplies, insurance, taxes, and general expense. It has not included in there any charge whatsoever for officers' salaries, depreciation, depletion, or any over-head charges.

Q. Do you know what the operating loss or profit was for the year 1938?

A. It was a loss, but I could not say exactly what—(stops)——

Q. Mr. Merchant, I will ask you to tell the Court, is this property fully developed yet?

A. No sir, it is not.

Q. When developed, what will be the potential capacity of production at this mine?

A. Well, the equipment, conveyors, tipples and so forth, are sufficient to handle approximately two thousand tons in eight hours.

Q. 2,000 tons in what?

A. Eight hours.

Mr. Adamson: That is all.

[fol. 89] Cross-examination.

Questions by Mr. Sher:

Q. Do you have this exhibit, may I have it? (Takes it.) This operating statement shows a commission on sales for the year 1939 of $32,047.25. To whom was that commission paid?

A. To the Binkley Coal Company.

Q. Has the Binkley Coal Company the exclusive sales agency for all Sunshine Coal?

A. Yes sir.

Q. And the Binkley Coal Company is located in Chicago, Illinois?

A. Yes sir.

Q. Are you an officer of the Binkley Coal Company?

A. I am.

Q. What office do you hold?

A. Secretary and treasurer.

Q. The Sunshine Anthracite Coal Company has no office n Chicago, has it?

A. Yes, I would say they have, it is in, it's in the same office it is in—it's in the same office, room, that the Binkley Coal Company, but it is considered the office of the Sunshine Anthracite Coal Company, they receive mail there.

[fol. 90] Q. The Sunshine Anthracite Coal Company is an Arkansas corporation, and its sole business is operating the coal mine in Arkansas?

A. That is right.

Q. And the only office it has in Chicago is the office it has in conjunction with the Binkley Coal Company?

A. That is right.

Q. By reason of the fact you are an officer of both companies?

A. That is right.

Mr. Adamson: Now we object to what the reason is, that is just a state of mind.

The Court: That is rather a formal question and he has answered it.

Mr. Sher: (Resuming cross-examination.)

Q. I notice that you have legal expense of $6,817.02, is that for defending, for prosecuting this lawsuit, Mr. Mercha.t?

A. For part of it.

Q. Now your balance sheet shows fixed assets as of December, 1939, total $502,878.38, which includes plant and equipment, development, and machinery and equipment, lease hold, building, land, furniture and fixtures, and an automobile. I understand you to say that you think all *all* [fol. 91] of these assets, fixed assets, would bring no more than twenty five or thirty thousand dollars on the market today.

A. I do not think it would bring more than that.

Q. For all that machinery and equipment, which is carried on your books at $111,214.92?

A. That is right.

Q. Well, is that because of the general depressed condition of the coal industry, or is it because of some peculiarity of this particular machinery?

A. Well, I would say both items enter into it.

Q. Is this mine in good condition mechanically or in bad shape?

A. No, I don't say it is in, I would say it is in fairly good condition, but the equipment is equipment that is built and

put into this mine for this mine alone. That equipment would be—No one would want the equipment in the mine where you had a six or seven foot thickness of coal, or other conditions. In order to place the equipment in any other mine, it would have to be a mine of similar conditions.

Q. Is it your idea that you test the value of mining property by what it would be worth to tear down and move or [fol. 92] don't you test it by what it would be worth to somebody who would want to operate the machinery?

A. Well, from that standpoint, the record shows, the mine has lost money so it would not have much value from an earnings standpoint.

Q. Would your company be willing to sell the mine to me today for twenty five or thirty thousand dollars?

A. That might be a good policy.

Q. So that estimate of the value of this particular mine is based largely on the fact the mine has not been making money?

A. That is right.

Q. Would you say generally throughout the country that mining property that is listed at five hundred and twenty thousand dollars would not bring more than twenty five or thirty thousand dollars?

A. Lots of them have not.

Q. Are you talking about a forced sale or sale where you have a buyer who is willing to buy and a seller willing to sell?

A. Well, if you have a buyer willing to buy and a seller willing to sell, you can always arrive at a price.

Q. And that price would be considerably higher than twenty five or thirty thousand dollars?

A. Yes, and there has to be some reason for a man being [fol. 93] willing to buy.

Q. That is true of all sales?

A. Yes.

Q. Suppose you had a buyer willing to buy that was interested in coal properties, let's forget about forced sales, what would you estimate the sale value of this property today?

A. It would be pretty hard to estimate, because any estimate that I have ever made on a coal property was based on earning value, I think that that is the only, only fair point at which you can purchase any coal property, it may have ten million dollars of investment, but if it has lost money,

it is not worth anything to you unless there is some possibility of changing it and making it earn money.

Q. And you would not consider the equipment as assets of any value at all, you only consider its earnings?

A. That has always been my theory on the value of a coal property.

Q. Is it not possible for a good coal operator to take property that has been losing money and turn it into a good, going concern?

A. That has been done, yes.

Q. How would you value this property if you were interested in buying it?

A. I would value it more from a survey of its potential [fol. 94] earnings than any other one point.

Q. But you have not any opinion as to what it is worth in the free and open market?

A. No, I have not.

Q. Now, turning for a moment to this matter of not being able to borrow money on the mine, that is tied into this same question of sale, you can't borrow money on it because it has not been making money?

A. That is right.

Q. If a mine were making money, was profitable, then it would be possible to borrow money on it?

A. Be much more probable, however, the banks do not like coal properties.

Q. And is that because the coal industry generally has been in a depressed condition for a number of years?

A. I think so.

Q. I notice that in the balance sheet of current liabilities there is an item as of December 31, 1939, of $242,495.20, owed to the Binkley Coal Company. Can you tell us what that is for?

A. Money advanced.

Q. Does the Sunshine Anthracite Coal Company buy coal from Binkley or sell coal through Binkley?

A. Sells coal through Binkley.

[fol. 95] Q. How did Binkley happen to advance that much money?

A. Well, the Sunshine has—(stops)—spent over $100,000.00 in equipment.

Q. And got it all through Binkley?

A. And they lost money for two or three years, and it had

to come from some place, and the Binkley Coal Company has advanced it.

Q. The Binkley will take a chance where a banker wouldn't be willing to?

A. Always has.

Q. What is the Binkley Coal Company? Is that a selling agency, or does it also operate mines throughout the country?

A. It is a selling agency.

Mr. Adamson: Now, we wanted to let it come in to bring out the situation, the Binkley Coal Company is not a party to this suit, and anything with reference to the Binkley Coal Company is immaterial and irrelevant, and could not throw any light upon the issues involved in this case.

Mr. Sher: You say they owe Binkley $242,000, and I thought I ought to be allowed to inquire how it come about and what for.

[fol. 96] Mr. Adamson: He has given you that, and now he is asking something about what the Binkley Coal Company is.

Mr. Sher: I am trying to find out how they come to owe that much money on a mine which is worth twenty-five or thirty thousand dollars.

The Court: It would seem the whole statement is before us, and it would seem that cross examination on the items in the statement is admissible—The objection at this time is overruled.

Mr. Sher: Will you read the question please, Mr. Reporter?

The Reporter (Reading): "What is the Binkley Coal Company? Is that a selling agency or does it also operate mines throughout the country?"

A. A selling agency.

Q. Exclusively?

A. That is right.

Q. And generally, as part of its activity as selling agent, it advances money to various mining companies to tide them [fol. 97] over periods of stress?

A. Often quite often.

Q. Now, this $242,000 was advanced in that manner?

A. That is right.

Q. For development purposes and for needed capital and so on?

A. That is right.

Q. Now what commission does the Binkley get on its sales of Sunshine Coal?

A. Fifty cents a ton on prepared sizes, domestic sizes, and twenty five cents on commercial sizes.

Q. Is that generally the commission scale that holds throughout the coal industry, if you know?

A. In this territory, it is.

Q. Now these other items of liability, $20,867.11 to "Trade Creditors"; does that mean—current supply bills?

A. Yes sir.

Q. Notes payable due in ninety days, $7,250.00; to whom is that due and payable?

A. Well, there is, at that time there was about $1600.00 due the Reconstruction Finance Corporation.

Q. And has that been cut down since?

A. Yes sir, there was a payment around the first of February, $1250.00, for that period, and the other, I can't give the total on it, but it is for various creditors. We had given [fol. 98] notes rather than—(stops)——

Q. Is any of that due to the Binkley Coal Company?

A. I think not.

Q. Long term notes $37,415.25; to whom is that payable?

A. That is payable to the Binkley Coal Company.

Q. Was that a part of the $242,000 owed——

A. Correction there on that, that is, that is notes, that is still due to the Dow Manufacturing Company on this equipment, which is payable $2,000.00 a month.

Q. And are these notes guaranteed by the Binkley Coal Company?

A. No, they are not.

Q. Not guaranteed at all?

A. No.

Q. Is there a lien on the equipment for security?

A. Yes sir, their equipment is sold in that way.

Q. Now, are there any mortgages or liens or any other kind on this property?

A. The Reconstruction Finance Corporation has some mortgages on this property.

Q. But that balance is just a little over $400.00?

A. Yes, I think the final note on that is due in April.

Q. Are there any other liens or mortgages on the property?

A. I think, I think the Binkley Coal Company has a second [fol. 99] mortgage to secure—(stops)——

Q. Now, the Binkley Coal Company owns the controlling stock interest in the Sunshine Anthracite Coal Company?

Mr. Adamson: We object to that, if the Court please.

The Court: That seems to be a serious objection; what do you say as to that?

Mr. Sher: Here is $321,000 of liabilities, $242,000 is owed to the Binkley Coal Company, I think the situation, the financial condition of the company is different if that money is owing to a controlling stockholder than if it is owing generally. Now, I do not propose to pursue this to any great extent, but I think it is appropriate to bring out the relationship as between these two companies.

The Court (after conferring among themselves): Well, the objection is sustained to that question.

Mr. Sher: We take exception to the ruling of the Court and offer to prove through the witness Merchant that the Binkley Coal Company owns the controlling interest in the Sunshine Anthracite Coal Company through stock owner-[fol. 100] ship. I am sorry I am unable to do any better than that on the offer, your Honors, because the information is peculiarly within the knowledge of this witness and the plaintiff.

The Court: The ruling stands—You did object to the offer?

Mr. Adamson: We object of course, if the Court please.

The Court: The same ruling.

Q. Do you have with you, Mr. Merchant, any figures as to the tonnage of coal sold by the Sunshine Anthracite Coal Company during the last two or three years?

A. It shows the tonnage there.

Q. By reference to this, can you tell us what the tonnage was in 1939?

A. Why, yes, 104,739.10, tons.

Mr. Adamson: Say it loud enough for the Court to hear.

A. 104,739.10 tons.

[fol. 101] The Court:

Q. Produced and sold?

A. That is right.

Mr. Sher:

Q. Do you have any figures for 1938?

A. No, I have not.

Q. Can you tell us roughly about how these figures would compare with the figures for 1939?

A. Smaller.

Q. Would you say the 1939 sales were twice the 1938 sales?

A. Well, I wouldn't want to say positively that they were; I will say that the 1939 sales were substantially larger than the 1938.

Q. Now how did 1938 compare with 1937?

A. Well, I would say approximately the same, the tonnage was light in both years.

Q. And was 1937 the first year that the Sunshine was operated by new machinery and equipment?

A. It was.

Q. Was the Binkley Coal Company the sales agent prior to 1937?

A. It was.

Q. Do you know what the tonnage of the other operators [fol. 102] in the Spadra field was in 1939?

A. No, I do not.

Q. Do you have anything to do with the advertisements that are put out by either the Sunshine Anthracite Coal Company or the Binkley Coal Company with respect to this Sunshine coal?

A. Do you mean do I have personal charge of it?

Q. Do you have anything to do with it?

A. No—I know that it is advertised.

Q. Are the advertisements submitted to you before they are put out?

A. No.

Q. Do you see them?

A. I see them, yes.

Defendant's Exhibit Number One marked for identification.

Mr. Sher: Now I shall show you the defendant's exhibit number one which on its face appears to be an advertisement put out by the Binkley Coal Company at its Minneapolis office. This contains the statement——

Mr. Adamson: Now if your Honors please——

[fol. 103] Mr. Sher: This is an equity case, please, if you will permit me to ask the question, I do not think the jury here will be seriously misled. It contains the statement

"Ruby-Glow Arkansas Anthracite, formerly sold as Sunshine" and that is a list of the prices. At the bottom it states "This mine produced more coal than the rest of the combined field last season." I will ask you if you are familiar with that advertisement?

(Hands exhibit one to the plaintiff.)

Mr. Adamson: Now, if your Honors please, we would kind of like to let that go in as a little "puffing" but we do not think it has anything to do with this record.

The Court: I cannot see where it has. Wherein do you think it is relevant?

Mr. Sher: The comparison of this company with its competitors, it is a factor to be considered in connection with whether equitable relief should be granted.

Mr. Adamson: The only question is the ability to pay on its part, whether they produced more or less coal is immaterial.

[fols. 104-117] Defendant's Exhibit Number One

Defendant's exhibit number one, being "June, 1939 Price List of Binkley Coal Company" offered in evidence by defendant, as defendant's exhibit number one, same was objected to by counsel for plaintiff, the objection was sustained by the Court, and said exhibit is in words and figures as follows:

. . . . . .

[fol. 118] The Court: We think the objection will be sustained.

Mr. Sher: We take an exception and offer to prove from the witness Merchant that the Sunshine Anthracite Coal Company produced more coal than the rest of the combined field in the season prior to June, 1939.

Mr. Adamson: The same objection.

The Court: The same ruling.

Mr. Sher:

Q. Can you tell us, Mr. Merchant, what commissions the Binkley Coal Company received in the year 1937-38 on this coal?

Mr. Adamson: We object; wait a minute.

Mr. Sher: Yes, sir.

A. No, I can't.

Mr. Adamson:

Q. You mean from the Sunshine Antharcite Coal Company?

The Court: He says he can't tell.

[fol. 119] A. You mean in dollars and cents; I haven't that with me and I would not know.

Mr. Sher:

Q. The rate paid for commissions in 1937-38 was the same as that paid in 1939?

A. That is right.

Q. Can you tell us how the amount of production of Sunshine in each year is determined?

A. By railroad weight.

Q. Who decides whether Sunshine should produce 50,000 tons or 100,000 tons?

A. That is a matter of moving the product.

Q. If the Binkley Coal Company is able to sell the coal, the Sunshine Anthracite Coal Company produces it?

A. That is right.

Q. And that is the sole basis?

A. That is right, up of course to the limit of production.

Mr. Sher: I think that is all.

Redirect examination.

Questions by Mr. Adamson:

Q. In 1937-38, Mr. Merchant, was the Sunshine mine fully developed?

A. No, sir.

[fol. 120] Q. What was its capacity of production, if you know, during the first year of the development of the mine?

A. Well, not to exceed $500.00 per day.

The Court: You mean five hundred tons in an eight hour shift.

A. Five hundred tons in an eight hour shift.

Recross-examination.

Mr. Sher:

Q. That is the first year?

A. That is right.

Q. Now in the second year what would be its capacity?

A. Well, it was not much above that.
Q. And the mine is not yet fully developed?
A. Not yet fully developed.

Mr. Sher: That is all.
Mr. Adamson: That is all.
The Court: The witness may be excused.

OFFERS IN EVIDENCE

Mr. Adamson: We offer in evidence, if your Honors [fol. 121] please, the deposition of Dr. Arno C. Fieldner, chief of the Technological Branch, and chief engineer of the Coal Division, Bureau of Mines, Washington, D. C.

Mr. Sher: We object to the introduction of this evidence on the ground that all of it goes to the question of the character of the plaintiff's coal and that question has been conclusively determined by the Bituminous Coal Commission in the Circuit Court of Appeals for the Eighth Circuit in the case of Sunshine Anthracite Coal Company against the National Bituminous Coal Commission, 105 Federal Second, 599, and it is outside of the scope of the issues before this Court, as determined in its decision on January 8th, 1940.

The Court: Is that the matter the deposition is directed to?

Mr. Adamson: Well, that would be rather difficult to answer, yes or no, if your Honors please. Certainly the deposition as to his qualifications is admissible. Then he testifies as an expert upon the question of the classification of coal, if your Honors please. Now, we offer this upon this theory: Ultimately we intend to take the position which we think is sound, that the construction of the terms of this Act is purely a judicial function and cannot be dele- [fol. 122] gated to any administrative board. In arriving at the correct construction of the language used in the Statute, this Court can take into consideration the facts which existed at the time, the conditions which existed at the time, the history of the legislation, and of the object that is being legislated with reference to the rules of construction laid down by the Courts. It is our contention that the ultimate construction, when you take out the object to which this Act is to be applied, is a judicial function, and that is if it is construed any other way, it raises a serious legal question as to its validity, both on the ground

of the delegation of judicial power and the ground of the delegation of legislative power.

The Court: These are matters of argument, and you have the deposition and it is directed toward the general inquiry?

Mr. Adamson: It is directed toward——

The Court: It can be used in argument and the deposi-[fol. 123] tion will be excluded and the objection sustained and exceptions allowed.

Mr. Adamson: We offer to prove by the deposition of the witness, in the deposition, and the deposition will so testify, if permitted to answer——

The Court: You may offer to prove what is shown in the deposition.

Mr. Adamson: Let the record show we offered it, offered to prove it.

The Court: Let the record show you offer to prove what is in the deposition and that you except.

Mr. Adamson: Yes sir, and we are saving exceptions without—I do not believe it is necessary to save exceptions.

The Court: That is so; the rules provide it, and I take it the statement in that deposition is to the same point and the same ruling as to the offer.

Mr. Adamson: Alright, we will make the same offer of Thomas A. Hendricks. We offer in evidence the deposition of Thomas A. Hendricks, geologist with the Geological [fols. 124-125] Survey, United States Department of the Interior, Washington, D. C. Now, this is the same thing.

Mr. Sher: And we make the same objection to the receipt of this testimony.

Mr. Adamson: And we make the same record.

The Court: And the ruling is the same and you offer to prove what is in it and you make the same objection and the record will be repeated.

Depositions

The above depositions offered in evidence by the plaintiff, excepted to by defendant, and exceptions sustained by the Court, and the same are in words and figures as follows:

[fol. 126] IN UNITED STATES DISTRICT COURT

[Title omitted]

Washington, D. C.,
Saturday, December 16, 1939.

[fol. 127] Depositions of Dr. Arno C. Fieldner and Thomas A. Hendricks, witnesses of lawful age, taken on behalf of the defendant in the above-entitled cause, wherein The Sunshine Anthracite Coal Company is the plaintiff and Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, is the defendant, pending in the District Court of the United States for the Eastern District of Arkansas, Western Division, pursuant to agreement, before Lloyd L. Harkins, a notary public in and for the District of Columbia, at room 4415 New Department of the Interior Building, Washington, D. C., at 10:10 o'clock a. m., on Saturday, December 16, 1939.

Appearances:

On behalf of the plaintiff: Henry Adamson.
On behalf of the defendant: Robert E. Sher, Special Assistant to the Attorney General. Harold Levinthal, Attorney, Bituminous Coal Division, Department of the Interior. Robert L. Stern, Special Assistant to the Attorney General.

Mr. Adamson: These depositions are taken by agreement.
[fol. 128] Mr. Sher: It is understood by agreeing to the taking of these depositions without the notice required by the rules, that the defendant does not waive the objection to the admissibility of the evidence.

DR. ARNO C. FIELDNER, a witness of lawful age, was thereupon duly sworn and, being examined by counsel, testified as follows:

Direct examination.

By Mr. Adamson:

Q. State your name and address, Doctor.
A. Arno C. Fieldner, Cosmos Club, Washington, D. C.
Q. What is your official position?

A. Chief, Technological Branch, and chief engineer of the Coal Division, Bureau of Mines.

Q. How long have you been connected with the Bureau of Mines, Doctor?

A. Since it was organized and established in 1910.

Q. What was your preliminary education?

A. I graduated in 1906 in chemical engineering from the Ohio State University.

Q. What profession or business did you engage in immediately after your graduation?

A. I worked for the Denver Gas & Electric Company immediately after graduation for somewhat less than a year.

[fol. 129] Q. What was the nature of your employment with them?

A. I was an apprentice gas engineer.

Q. Did you at that time deal in and study coal?

A. No, sir.

Q. When did you first start dealing with coal?

A. In 1907, when I entered the service of the Technological Branch of the United States Geological Survey. I began work on coal analysis at that time.

I continued on coal analysis work up to the period that this Technological Branch was transferred to the newly created Bureau of Mines in 1910. Some time, a year or two later, I was in charge of the coal analysis laboratory at the Pittsburgh Experiment Station of the Bureau of Mines.

Q. Since that time have you been engaged in the technological study of coal?

A. Yes, I have been engaged in the technological studies relating to coal, its composition and its utilization from time to time ever since that period.

Q. In the discharge of your official duties, Doctor, just what particular field of coal did you deal with?

A. As chief engineer of the Coal Division I have administrative and technical charge of the investigative tech-

[fol. 130] nical studies of the Bureau of Mines, all relating to the composition, analysis and testing of coal, to research on its utilization as a fuel, utilization as a raw material for the manufacture of coke and gas, and to its utilization for the production of liquid fuels.

Q. In other words, in your official capacity, you made a study of all production and use of coal?

A. Personally I didn't give much attention to the mining of the coal, the methods of mining or the methods of pre-

paration or washing; my personal interests are in the composition of coals and their utilization and testing.

Q. But you deal with the coal industry of the entire United States?

A. Well, yes, any of us in the Bureau of Mines deal with those subjects from a national point of view and take in the entire coal industry.

Q. Now, Doctor, I will ask you to state what you mean by classification?

A. Well, in my work on the classification of coal, naturally my definitions of coal classification are closely allied to its classification on the basis of its properties, its chemical and physical properties as worked out by the Coal Classification Committee, sponsored by the American Society for Testing Materials, operated under the rules of the American Standard Association.

[fol. 131] There are other points of view of coal classification. There are many ways in which coal might be classified, depending on the point of view.

Q. Is there at this time any classification which is generally approved and in general use in the coal mining industry?

Mr. Sher: We object to this evidence on the ground that it is incompetent, irrelevant, and immaterial; and on the further ground that this Court is without jurisdiction to hear any questions relating to the character of the plaintiff's coal; and on the further ground that all questions relating to the character of the plaintiff's coal have been conclusively determined in the case of The Sunshine Anthracite Coal Company vs. National Bituminous Coal Commission which was tried before the National Bituminous Coal Commission, and on appeal before the Circuit Court of Appeals for the Eighth Circuit and affirmed by the United States Supreme Court.

Mr. Adamson: No, it was not affirmed by the United States Supreme Court.

[fol. 132] Mr. Sher: Certiorari was denied by the United States Supreme Court.

Let the record show that this objection will stand to all evidence relating to the character of plaintiff's coal without the need of making separate objections to each question.

Mr. Adamson: That is satisfactory.

Now, will you read the question?

(The pending question, as above recorded, was read by the reporter.)

The Witness: That is the question I have to answer?

Mr. Sher: Yes.

Mr. Adamson: He just notes an objection; that is all.

The Witness: There is a classification of coals according to rank that has been adopted by the American Society for Testing Materials and by the American Standards Association which is available for the general use of the coal industry.

By Mr. Adamson:

Q. Is that the end of your answer, doctor?

[fol. 133] A. Yes.

Q. Is that a standard in general use in the coal industry at this time?

A. I can't say from personal knowledge as to whether or not this standard is in general use throughout the entire coal industry. I think it is gaining ground. It is quite new and it has only been adopted for a few years. Parts of it, I know, are in pretty general use because they are not much different from the older customary classifications.

Q. Doctor, do you use this standard in your work and in your official capacity with the United States Bureau of Mines?

A. Yes, sir.

Q. Now, Doctor, prior to 1926, did the words "bituminous", "semibituminous", or "subbituminous" have any well defined meaning in the coal industry?

A. Semibituminous?

Q. Bituminous, semibituminous, and subbituminous, in that order?

A. Bituminous and semibituminous were pretty generally used in the coal industry prior to this classification; subbituminous was perhaps not so generally used.

Q. I will ask you to state what the term "bituminous" as generally used in the coal mining industry prior to 1926 meant.

[fol. 134] A. It is rather difficult for me to say just what "bituminous" did mean to the members of the coal industry. I would have to guess at that.

My guess is that probably any coal except anthracite or lignite would be bituminous coal; that is, outside of anthra-

cite or lignite. In general, coals which give off smoke and gas, on distillation. That is what "bituminous" means.

Q. What basis did you use for classifying coal prior to 1926?

A. We used the U. S. Geological Survey classification of M. R. Campbell.

Q. Doctor, could you tell us what the method of classifying bituminous coal in the Campbell formula prior to 1926 was?

A. It was based largely on what they call fuel ratio; that is the ratio of the fixed carbon to the volatile matter in the coal.

Q. Are you acquainted with the Spadra Field in Arkansas and the coal production there?

A. In a general way, yes, although I have never been there.

Q. Did your department have occasion to classify that coal prior to 1926?

[fol. 135] A. No, we accepted the Geological Survey classification.

Q. Do you know what the classification was of the Geological Survey?

A. I don't know from personal knowledge for the individual coals. I know there was some anthracite and low volatile bituminous in Arkansas, but I cannot say and I do not remember what the classification was for this particular mine by the Geological Survey at that time.

Q. Do you remember what the classification of the Spadra Field was at that time?

A. I could not tell you.

Q. Doctor, after 1926 was there any standard generally used in the coal industry for the classification of coals?

A. Well, my opinion is that no particular change took place in the coal industry immediately after 1926.

Q. Was there a committee appointed to standardize classification?

A. There was, yes.

Q. I will ask you to state briefly the history of that committee.

A. The Committee known as the Sectional Committee on the Classification of Coal was organized under the sponsorship of the American Society for Testing Materials under the rules of the American Standards Association.

This committee actually was organized at a meeting on

[fol. 136] June 10, 1927, but there was a preliminary meeting in 1926, which was called by the American Standard Association, at which there were present the representatives of the various engineering, scientific and trade associations interested in the production or the consumption of coal.

This meeting was held in Pittsburgh, and they passed a resolution that there was need for the development of a standard system for classifying coals that would be generally acceptable in this country.

Q. Now, Doctor, you were chairman of that committee, were you not?

A. At this organization meeting in 1927 I was elected chairman of that committee.

Q. Was this Dr. Campbell, who was with the Geological Department, on that committee.

A. Yes, he was a member of that committee.

Q. Now, you may state briefly what the results of that committee's work were.

A. The committee first adopted a statement of the scope of this work. This is given in the following words: the classification of all coals from anthracite to lignite to be [fol. 137] based upon such chemical and physical characteristics as will make the plan most readily adaptable to industry and commercial use on a national scale.

Now, this committee had the cooperation of another committee, representing the Canadian group. This other committee was called the Associate Committee on Coal Analysis, which operated under the auspices of the National Research Council of Canada.

Through this cooperation the classification was planned for both Canada and the United States Coals.

The committee carried on extensive studies of the coals of the country and examined various previously proposed systems of classifications. They also carried on a great deal of research work on the properties of coal, and in the course of several years they drew up and submitted tentative specifications for the classification of coals by rank and by grade. These tentative specifications were adopted as ten-ative by the American Society for Testing Materials in 1934.

These tentative specifications cover the classification of coals in different classes and groups ranging from the lignitic class on the one hand to the anthracite class on the other.

In this scale of classification, the lowest rank was lignite, [fol. 138] and then subbituminous next, and then bituminous, and then the anthracitic class.

These classes again were subdivided into groups, as for example, the anthracitic class comprising three groups: metaanthracite, anthracite, and semianthracite.

Likewise, the bituminous class was divided into five groups: Low volatile bituminous coal, medium volatile bituminous coal, high volatile A bituminous coal, high volatile B bituminous coal, and high volatile C bituminous coal.

These tentative specifications were revised somewhat in the following year, 1935.

Q. Now, were there any material changes made at that time?

A. Well, there was one rather material change made in 1935.

Q. What change was that, Doctor?

A. In the low volatile bituminous coal group, the boundary line was changed one per cent in the fixed carbon. In the 1934 specification giving 77 per cent dry fixed carbon, that was changed to 78 per cent dry fixed carbon, and the dry volatile matter was changed from 23 to 22 per cent. That was between the boundary line between the low volatile bituminous coal and the medium volatile bituminous coal where this change was made.

[fol. 139] Q. At the time of that change was this method of classification in general use both by the consumers and the producers in the coal industry?

A. I doubt whether it was in general use, at that time.

Q. When, in your opinion, did it become of general use in the industry?

A. I really haven't any opinion on that; I don't know how generally it is used in the industry, per se as of this time. I know we used it in the Government in the Bureau of Mines for the classification of coals in our technological work and in our statistical work and in our buying of coals for the Government, but it is rather difficult for me to answer that.

I may say this, in addition, that the National Association of Purchasing Agents has been quite active in introducing this new system of classification into the industry. They have gotten out some publications on it.

Q. What territory do they cover?

A. They are a national agency.

Q. The National Association of Purchasing Agents?

A. Yes, of purchasing agents.

Q. Now, in your contract, with the producers, have you gathered any information as to whether or not it is in use with the producers?

[fol. 140] A. I really haven't enough information to say.

Q. Do you know some producers who are using it?

A. I cannot point out a specific instance because that sort of material, that is concrete evidence, does not come to me.

Q. It comes to other members of the department, however?

A. Well, I don't know as it would, although it would if we still had the Statistical Division on Bituminous Coal, but that is now in the Coal Division, or was transferred to the Coal Division. They would know as to how the industry uses if because they deal with the statistics that are sent in.

My general reaction is that the more progressive of our coal companies do use this classification, but I really cannot point out any documentary evidence of it. I do know that there is a great lag in the use of any new scheme of nomenclature among laymen.

Q. Does the term "bituminous coal" have any well defined meaning in the coal industry at the present time?

A. I think it does.

Q. Will you state what that meaning is?

A. I think that in the coal industry "bituminous coal" means coal which burns with a luminous flame, which gives off smoke, and which gives off a considerable percentage [fol. 141] of gas when it is heated in a closed retort. It may or may not form a coke in the residue left behind. It may be coke or it may be a char.

I think those are the principal characteristics used ordinarily outside of the coal classification scheme. I am speaking now outside of the coal classification scheme.

Q. Can you express what you have said in the chemical formula?

A. I can express the definition of bituminous coal in terms of the coal classification system that was agreed upon by this committee, the American Society for Testing Materials, and the American Standards Association.

Q. In your opinion, Doctor, is that a correct method of classification?

A. Yes, that is in my opinion. That is a correct method of classification.

Q. Doctor, what is semibituminous coal?

A. Semibituminous is a name that was applied to a rank of coal under the older Geological Survey system of classification. This name was not used in the new A. S. T. M. [fol. 142] classification; its place was taken subsequently by the two groups, the low volatile bituminous coal and the medium volatile bituminous coal.

Q. Would you say then that the term "semibituminous" at the present time means the same as semi low volatile and medium volatile bituminous in the standard A. S. T. M.?

A. It would mean the same as the low volatile bituminous group plus part of the medium volatile bituminous coal, but not all of it.

Q. Doctor, assuming coal that has been analyzed, and the analysis of a dry mineral matter free basis shows a fixed carbon content of 87.55 per cent and a volatile matter content of 12.76 per cent and which is nonagglomerating, what, in your opinion, would be the proper classification of that coal?

A. It should be classified in the semianthracite group of the anthracitic class of coal.

Q. Doctor, in your opinion, is there anthracite coal produced outside the State of Pennsylvania?

A. Yes, unquestionably there is anthracitic coal produced outside of Pennsylvania.

Q. Do you know of any coal more than 86 per cent fixed [fol. 143] carbon on a dry mineral matter free basis and less than 14 per cent and more than 8 per cent volatile matter that is agglomerating?

A. I don't know of an individual coal that is agglomerating within those limits of volatile matter.

Q. So far as your research has reached, you have found none of that chemical content that is agglomerating?

A. No, we have not found any.

Mr. Adamson: I think that is all.

Mr. Sher: I have no questions.

(Signed) Arno C. Fieldner.

Subscribed and sworn to this 18 day of December, A. D., 1939. (Signed) Lloyd L. Harkins, Notary Public in and for the District of Columbia. My commission expires September 1, 1942. (Seal.)

[fol. 144] THOMAS A. HENDRICKS, a witness of lawful age, was thereupon duly sworn, and, being examined by counsel, testified as follows:

Direct examination.

By Mr. Adamson:

Q. Give your name and your residence.

A. Thomas A. Hendricks, Washington, D. C.

Q. What official position, if any, do you occupy with the Government?

A. I am a geologist with the Geological Survey, United States Department of Interior.

Q. How long have you been a geologist with the Government?

A. Since 1929.

Q. What was your preliminary education in geology?

A. I was graduated from Northwestern University in 1928 with a degree of Bachelor of Science in Geology. I received a degree of Master of Science in geology from Colorado University. I think it was in 1931.

Q. Since your graduation have you been engaged in geologic work?

A. Continuously.

Q. In your work, have you had to deal with the formation of coal, Mr. Hendricks?

A. Yes.

[fol. 145] Q. Has that been your exclusive work?

A. No, not my exclusive work, but the principal work, the geology of coal fields, and other geological problems relating to coal.

Q. Briefly, will you give the theory of the formation of coal?

Mr. Sher: We object to this evidence on the ground that it is incompetent, irrelevant, and immaterial; and on the further ground that this Court is without jurisdiction to hear any question relating to the character of the plaintiff's coal; and on the further ground that all questions relating to the character of the plaintiff's coal have been conclusively determined in the case of The Sunshine Anthracite Coal Company vs. National Bituminous Coal Commission which was tried before the National Bituminous Coal Commission, and on appeal before the Circuit Court of Appeals

for the Eighth Circuit and certiorari was denied by the United States Supreme Court.

Let the record show that this objection will stand to all evidence relating to the character of plaintiff's coal without the need of making separate objections to each question. That objection applies to all the testimony of this witness.

[fol. 146] Mr. Adamson: That is satisfactory.

The Witness: The commonly accepted theory of the origin of coal is that it has formed from vegetable remains that were deposited under water under conditions that permitted the stagnation so that the vegetable remains would not be destroyed but be preserved; that they were later covered by sand and silt or other inorganic material, and through chemical and physical alteration by heat and pressure were transformed through stages of peat, lignite, bituminous, anthracite, and finally to graphite.

By Mr. Adamson:

— What do you mean by the term "classification of coal"?

A. The classification of coal may be by any one of a large number of different methods; coal may be classified according to age, according to beds.

Q. According to what?

A. According to beds, coal beds, or according to rank in the scale from lignite to anthracite; according to grade, as to impurities and burning characteristics, or according to type, as the ingredients, the vegetable ingredients that are preserved in the coal, and so on.

Q. What I meant by the question, the classification is the designation of the degrees of metamorphosis?

A. The classification according to rank.

[fol. 147] Q. Is a degree of metamorphosis.

A. By classification of coal according to rank is meant the degree of alteration that coal has undergone in the natural sequence between lignite and anthracite.

Q. Mr. Hendricks, is there in general use at the present time in the coal industry generally and the geologic and technical study of coal any standard of classification by rank?

A. I am unable to say with regard to the coal industry in general; the Geological Survey uses for the purpose of classification of coal by rank the A. S. T. M. standard classification of coal by rank.

Some other organizations also use that classification, but I cannot say that it is used by all.

Q. You do not know whether it is in general use in the coal industry?

A. No, I would be unable to answer that.

Q. What are those other organizations that use it, if you know?

A. It has been used in a publication of the Illinois Geological Survey of Coal that Illinois classified in that publication according to that scheme of classification.

It has been used by the National Research Council of Canada in the coals that Canada was classifying in the [fol. 148] publication according to that scheme of classification.

Those are the only ones that I can recall offhand.

Q. Mr. Hendricks, in your geologic work, have you made any study of the coal fields of Arkansas?

A. I have.

Q. You are acquainted with the Spadra Field?

A. I am.

Q. And the coal that is produced in the Spadra Field?

A. Yes, I am.

Q. And has your department had occasion to classify the coal produced in the Spadra Field, Mr. Hendricks?

A. Is that at any time?

Q. Yes.

A. Yes.

Q. I will ask you how you classified that coal or in what classification they place the coal produced in the Spadra Field.

A. The coal produced from the Spadra Field is classified in the publications of the Geological Survey as semi-anthracite.

Q. Now, Mr. Hendricks, is that in the anthracite field or the bituminous field? I mean, if you classify coal as semi-anthracite, does that place it in the anthracite group or the bituminous group?

A. That places it in the anthracite class, the semi-anthracite group of the anthracite class.

[fol. 149] Q. Do you know when the first of these classifications was made?

A. By the Geologic Survey?

Q. Yes.

A. The first that I know of was in 1907.

Q. It was classed at that time as——

A. Semianthracite.

Q. Have there been any subsequent classifications, to your knowledge?

A. In 1913. There is a publication of the Bureau of Mines, a classification by the Geological Survey dealing with coals from the Spadra Field.

Q. How were they classified?

A. Semianthracite; one sample from that field being questionable placed as semianthracite.

Q. Do you know where that sample was taken from?

A. I don't recall; I simply recall that the coal was from Johnson County, Arkansas; I never personally looked up the mine.

Q. Mr. Hendricks, assuming those same figures that are used, of coal that upon analysis on a dry mineral matter free basis shows a fixed carbon content of more than 86 per cent and of volatile matter content less than 14 per cent [fols. 150-152] and more than 8 per cent, what in your opinion, would be the correct classification of that coal?

A. It would—impossible to classify it without——

Q. And was nonagglomerating. I meant to put that in.

A. The coal would be, in my opinion, coal classed as semianthracite.

Mr. Adamson: That is all I wish to ask Mr. Hendricks.

Mr. Sher: I have no questions.

(Signed) Thos. A. Hendricks.

Subscribed and sworn to this 18th day of December, A. D. 1939. (Signed) Lloyd L. Harkins, Notary Public in and for the District of Columbia. My commission expires September 1, 1942. (Seal.)

* * * * * * *

[fol. 153] PLAINTIFF'S EXHIBIT NUMBER TWO

Mr. Adamson: Now, if the Court please, we offer in evidence Plaintiff's agreement number two, and by agreement, the defendant—Before I get through stating what it is—by agreement defendant waives all questions as to authenticity and formality of proof.

The Court: Is that true?

Mr. Sher: Yes sir.

The Court: Alright.

Mr. Adamson: Then we offer in evidence plaintiff's exhibit number two, which is certified—Not a certified—an analysis of six samples of coal taken from the Sunshine Anthracite Coal Company mine and analyzed by the Commercial Testing and Engineering Company of Chicago, Illinois, which shows the analytical content of the Sunshine Coal Company and its non-agglomerating qualities. (This is off the record.)

The Court: We will hear from the objector, and that will show to what extent you have agreed.

[fols. 154-166] Mr. Sher: The same objection to the offer that we have saved to the deposition. We waived the objection to the proper authentication because in view of the Court's prior ruling, we don't see any need in requiring them to bring witnesses long distances in order to establish the evidence which they could establish if they were here.

The Court: The ruling will be the same and the offer is excluded.

The above documents, being six analysis reports made by the Commercial Testing and Engineering Company of coal samples submitted by Sunshine Anthracite Coal Company, offered in evidence as Plaintiff's exhibit number two, the introduction thereof objected to by defendants, and said documents excluded by the Court, and the same are in words and figures as follows:

. . . . . .

Plaintiff's Exhibit Number Two omitted. See pages 25-30 of Vol. II.

[fol. 167] Mr. Adamson: We offer under the same agreement as to authenticity.

The Court: That makes a rather vague record. You will make your offer and then we can have his objections and tell us what he has agreed to.

Mr. Adamson: We offer plaintiff's exhibit number three, which is a report of the investigations and classification chart of typical coals of the United States, showing B. T. U. per pound on the moist, mineral-matter-free basis, plotted against fixed carbon on the dry, mineral-matter-free basis, dated December, 1935, an official publication of the Bureau of Mines, Department of the Interior.

Mr. Sher: We make the same objection to the receipt of this testimony as to the receipt of the deposition, but we waive any objection as to the authenticity.

The Court: Is that sufficient? The ruling will be the same.

The above document offered in evidence as Plaintiff's Exhibit Number Three, was objected to by the defendant and the objection sustained by the Court, the document was excluded, and the same is in words and figures as follows:

* * * * * * *

PLAINTIFF'S EXHIBIT NUMBER THREE

[fol. 168] R. I. 3296. December 1935.

DEPARTMENT OF THE INTERIOR

UNITED STATES BUREAU OF MINES

John W. Finch, Director

REPORT OF INVESTIGATIONS

Classification Chart of Typical Coals of the United States

Showing B. T. U. Per Pound on the Moist, Mineral-Matter-Free Basis, Plotted Against Fixed Carbon on the Dry, Mineral-Matter-Free Basis.

(Official Seal of United States Bureau of Mines)

By A. C. Fieldner, W. A. Selvig, and W. H. Frederic

After this report has served your purpose and if you have no further need for it, please return it to the Bureau of Mines, using the official mailing label on the inside of the back cover.

[fol. 169] R. I. 3296,
December 1935.

Report of Investigations

Department of the Interior—Bureau of Mines

Classification Chart of Typical Coals of the United States [1]

Showing B. T. U. per Pound on the Moist, Mineral-Matter-Free Basis, Plotted Against Fixed Carbon on the Dry, Mineral-Matter-Free Basis

By A. C. Fieldner,[2] W. A. Selvig,[3] and W. K. Frederic[4]

The Sectional Committee on Classification of Coals, functioning under the sponsorship of the American Society for Testing Materials and the rules of the American Standards Association, in its 1934 report recommended to the American Society for Testing Materials [5] that Specifications for Classification of Coals by Rank be adopted as tentative. These specifications, slightly modified as recommended by the Sectional Committee, in its 1935 report,[6] were approved as tentative standards by the society in 1935. The specifications cover the classification of coals according to their degree of metamorphism, or progressive alteration, in the natural series from lignite to anthracite. The basic scheme of classification is according to fixed carbon and calorific value (expressed in B. t. u.) calculated to the mineral-matter-free basis. The higher-rank coals are classified according to fixed carbon on the dry basis, and the lower-rank coals [fol. 170] according to B. t. u. on the moist basis, that is, containing its natural bed moisture but free of visible sur-

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[1] The Bureau of Mines will welcome reprinting of this paper, provided that the following footnote acknowledgment is used: "Reprinted from U. S. Bureau of Mines Report of Investigations 3296."

[2] Chief engineer, Experiment Stations Division, U. S. Bureau of Mines, Washington, D. C.

[3] Chemist, Pittsburgh Experiment Station, U. S. Bureau of Mines, Pittsburgh, Pa.

[4] Junior chemist, Pittsburgh Experiment Station, U. S. Bureau of Mines, Pittsburgh, Pa.

[5] Sectional Committee on Classification of Coals, Report: Proc. Am. Soc. Test. Mat., 1934, part I, p. 463.

[6] Sectional Committee on Classification of Coals, Report: Proc. Am. Soc. Test. Mat., 1935, Part I, p. —.

face moisture. Agglutinating and weathering indices are used to differentiate between certain adjacent groups.

3463.

R. I. 3296.

Classification by Rank

(a) Fixed Carbon and B. t. u.

In these specifications coals having calorific values of [fol. 171] 14,000 B. t. u. or more on the moist, mineral-matter-free basis and coals having fixed carbon of 69 per cent or more on the dry, mineral-matter-free basis are classified according to fixed carbon on the dry, mineral-matter-free basis; coals having calorific values less than 14,000 B. t. u. on the moist, mineral-matter-free basis are classified according to B. t. u. on the moist, mineral-matter-free basis, provided the fixed carbon on the dry, mineral-matter-free basis is less than 69 per cent.

(b) Weathering Index

Coals showing weathering indices of less than 5 per cent are considered non-weathering; coals showing weathering indices of 5 per cent or more are considered weathering, from the standpoint of classification. The weathering or slacking characteristics are determined by the U. S. Bureau of Mines method,[7] modified with respect to the selection of a standard humidity of 30 to 35 per cent for air-drying the coal.

(c) Agglutinating Index

Coals having agglutinating indices of 500 g or more at a ratio of 15 parts sand to 1 part coal, by the U. S. Bureau of Mines method,[8] are considered agglutinating from the standpoint of classification.

Classification Chart

Table 1, taken from the 1934 and 1935 reports of the Sectional Committee on Classification of Coals, gives the [fol. 172] limits of fixed carbon and B. t. u. for classifying coals by rank.

3463.

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[7] Fieldner, A. C., Selvig, W. A., and Frederic, W. H., Accelerated Laboratory Test for Determination of Slacking Characteristics of Coal: Report of Investigations 3055, Bureau of Mines, 1930, 24 pp.

[8] Selvig, W. A., Beattie, B. B., and Clelland, J. B., agglutinating Value Test for Coals: Proc. Am. Soc. Testing Materials, vol. 33, part II, 1933, p. 741.

[fols. 173 174] R. I. 3296

Table 1.—Classification of coals by rank.

(Legend: F. C.=fixed carbon; V. M.=Volatile matter; B. T. u.=British thermal units)

Class	Group	Limits of fixed carbon or B. t. u., mineral-matter-free basis	Requisite physical properties
I. Anthracite	1. Meta-anthracite	Dry F. C., 98 percent or more (dry V. M., 2 percent or less)	Nonagglutinating [1]
	2. Anthracite	Dry F. C., 92 percent or more and less than 98 percent (dry V. M., 8 percent or less and more than 2 percent)	
	3. Semianthracite	Dry F. C., 86 percent or more and less than 92 percent (dry V. M., 14 percent or less and more than 8 percent)	
II. Bituminous [2]	1. Low-volatile bituminous coal	Dry F. C., 78 percent or mores and less than 86 percent (dry V. M., 22 percent or less and more than 14 percent)	
	2. Medium-volatile bituminous coal	Dry F. C., 69 percent or more and less than 78 percent (dry V. M., 31 percent or less and more than 22 percent)	
	3. High-volatile A bituminous coal	Dry F. C., less than 69 percent (dry V. M., more than 31 percent); and moist [3] B. T. u., 14,000 [4] or more.	
	4. High-volatile B bituminous coal	Moist [3] B. T. u., 13,000 or more and less than 14,000 [4]	
	5. High-volatile C bituminous coal	Moist B. T. U., 11,000 or more and less than 13,000 [4]	Either agglutination or nonweathering [5]
III. Subbituminous	1. Subbituminous A coal	Moist B. T. U. 11,000 or more and less than 13,000 [4]	Both weathering and nonagglutinating.
	2. Subbituminous B coal	Moist B. T. U. 9,500 or more and less than 11,000 [4]	
	3. Subbituminous C coal	Moist B. t. u., 8,300 or more and less than 9,500 [4]	
IV. Lignite	1. Lignite	Moist b. t. u. less than 8300	Consolidated
	2. Brown coal	Moist B. t. u., less than 8300	Unconsolidated.

[fol. 175] [1] If agglutinating, classify in low-volatile group of the bituminous class.

[2] Pending the report of the Subcommittee on Origin and Composition and Methods of Analysis, it is recognized that there may be noncaking varieties in each group of the bituminous class.

[3] Moist B. t. u. refers to coal containing its natural bed moisture but not including visible water on the surface of the coal.

[4] Coals having 69 percent or more fixed carbon on the dry, mineral-matter-free basis shall be classified according to fixed carbon, regardless of B. t. u.

[5] These are three varieties of coal in the high-volatile C bituminous coal group, namely, variety 1, agglutinating and nonweathering; variety 2, agglutinating and weathering; variety 3, nonagglutinating and nonweathering.

[fol. 176] R. I. 3296. The Bureau of Mines has cooperated with the Sectional Committee on Classification of Coals in the development of specifications for classification. A previous paper [9] gives a statistical study of a large number of coals of the United States with a view to establishing suitable boundary lines of fixed carbon and B. t. u. between different ranks of coal. The charts (figs. 1, 2, and 3) in the present paper show the B. t. u. of typical coals of the United States on the moist, mineral-matter-free basis, plotted against per cent fixed carbon on the dry, mineral-matter-free basis. These charts, when used in conjunction with the specifications for classification of coals by rank, as shown in table 1, are a convenient means of showing the position of typical coals of the United States in the scale of rank. The charts are reproduced with sufficient overlapping to permit cutting and pasting together to form a single chart, if desired.

Source of Coals

Table 2 gives the source of the coals shown in the charts and their rank in accordance with table 1. The numbers assigned the coals in the charts are the same as shown in the first column of table 2. The analyses represent standard mine samples collected by the Bureau of Mines method.[10] All of the analyses were made in the laboratories of the Bureau of Mines, except some coals from Ohio, which were analyzed by the Ohio State Geological Survey. Many of [fol. 177] the coals selected were taken from a list of representative coals of the United States compiled by Campbell.[11]

The last two columns of table 2 give references to published analyses. Analyses heretofore not published are given in table 3.

[9] Selvig, W. A., Ode, W. H., and Fieldner, A. C., Classification of Coals of the United States According to Fixed Carbon and B. t. u.: Am. Inst. Min. and Met. Eng. Tech. Pub. 527, class F, Coal Division, no. 56, 1934, 11 pp.

[10] Holmes, J. A., The Sampling of Coal in the Mine: Tech. Paper 1, Bureau of Mines, 1918, 22 pp.

[11] Campbell, M. R., The Coal Fields of the United States: U. S. Geological Survey Prof. Paper 100-A, 1917, 33 pp.

Computation of Mineral-Matter-Free Analyses

Mineral matter was taken as 1.1 times the ash. The values for fixed carbon and B. t. u. as given in the charts were calculated as follows:

$$\text{Moist fixed carbon} \times \frac{100}{100 - (\text{Moisture} + 1.1\ \text{ash})} = \text{dry, mineral-matter-free fixed carbon}$$

$$\text{Moist B. t. u.} \times \frac{100}{100 - 1.1\ \text{ash}} = \text{moist, mineral-matter-free B. t. u.}$$

[fols. 178-200] Moist, as used in the formulas, refers to the coal containing its natural bed moisture but not including visible moisture on the surface of the coal. For more accurate formulas which apply corrections for the sulphur in the coal, reference should be made to those for fixed carbon and B. t. u. as given in the 1934 Report of the Sectional Committee on Classification of Coals.

Caking Characteristics

Coals designated in the charts as caking or agglutinating produced a coherent coke button in the standard method for determination of volatile matter. Coals designated as noncaking gave a loose powdery residue.

According to table 1, coals coming within the range 11,000 to 13,000 B. t. u. on the moist, mineral-matter-free basis are classified as highvolatile C bituminous coal or as subbituminous A coal, according to their physical properties of agglutination and weathering. Specific information regarding these physical properties was lacking for some of the coals coming within this B. t. u. range, and the rank assigned them in table 2 is that shown in Bureau of Mines coal-analyses publications.

. . . . . .

[fol. 201] Mr. Adamson: Now, if the Court please, plaintiff offers in evidence Plaintiff's exhibit number four, which is "Anthracite Outside of Pennsylvania and Semianthracite Tables, 1936, United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, John W. Finch, Director.

Mr. Sher: We make the same objection, may it please the Court, and we waive any objection as to authenticity.

The Court: The same ruling, it will be excluded.

The above document offered in evidence as Plaintiff's Exhibit Number Four, was objected to by the defendant and the objection sustained by the Court, the document was excluded and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER FOUR

[fol. 202] United States Department of the Interior

Harold L. Ickes, Secretary

Bureau of Mines

John W. Finch, Director

Anthracite Outside of Pennsylvania and Semi-Anthracite

Tables, 1936

By L. Mann

Coal Economics Division

M. van Sicklen, Chief Engineer

These tables give the final statistics of production of anthracite outside of Pennsylvania and of semi-anthracite in the calendar year 1936, based upon detailed reports from the mine operators.

Washington, D. C., January 25, 1938.

Please File for Reference until Printed Chapter from Minerals Yearbook is Available.

6323.

(Here follows 1 paster, side folio 203)

[fol. 203] Anthracite Outside of Pennsylvania and Semianthracite in the United States in 1936

Production, Value, Men Employed, Days Operated, Man-Days of Labor, and Output per Man per Day at Anthracite Mines Outside of Pennsylvania and Semianthracite Mines in the United States in 1936.

(Includes coal classified as anthracite and semianthracite in Geol. Survey, Prof. Paper 100-A., "The Coal Fields of the United States.")
(Exclusive of product of wagon mines producing less than 1,000 tons)[a]

State	Net Tons					Value		Number of Employees					
	Loaded at mines for shipment	Commercial sales by truck or wagon	Other sales to local trade, or used by employees, or taken by locomotives at tipple	Used at mines for power and heat	Total quantity	Total (thousand dollars)	Average per ton	Underground	Surface	Total	Average number of days mines operated	Man-days of labor[b]	Average tons per man per day[b]
Arkansas	275,415	3,085	1,054	2,741	282,292	$926	$3.28	859	188	1,047	115	120,201	2.35
Colorado, New Mexico and Washington	38,416	847	513		39,776	173	4.35	117	45	162	184	29,871	1.33
Virginia	165,951	24,813	150	7,470	198,384	536	2.70	381	136	517	197	102,059	1.94
Total 1936	479,782	28,745	1,714	10,211	520,452	1,635	3.14	1,357	369	1,726	146	252,131	2.06
Total 1935	411,021	3,365	6,004	2,700	423,090	1,253	2.96	1,355	297	1,652	134	226,368	1.91

[fol. 204] [a] The figures relate only to active mines of commercial size that produced anthracite outside of Pennsylvania and semianthracite in 1936. The number of such mines in these fields in the United States was 41.

Size classes of commercial mines in 1936: There were 3 mines in Class 3 (50,000 to 100,000 tons) producing 30.8 per cent of the tonnage; 13 mines in Class 4 (10,000 to 50,000 tons) with 62.2 per cent; 25 mines in Class 5 (less than 10,000 tons) producing 7 per cent.

Methods of mining in 1936: The tonnage by hand was 35,648; shot off the solid, 217,468; cut by machines, 266,946; not specified, 390.

[b] Based upon (1) the "reported" number of man-shifts where the operator keeps a record thereof; otherwise upon (2) the "calculated" number of man-shifts obtained by multiplying the average number of men employed underground and on the surface at each mine by the number of days worked by the mine and tipple, respectively. Using throughout the "calculated" man-shifts as developed before the year 1932, namely, the product of the total number of men employed at each mine times the tipple days, the average output per man per day was 2.09 in 1936.

[fol. 205] Number and size of mines.—There were 41 active mines in 1936 in the semi-anthracite and anthracite fields outside of Pennsylvania, as reported to the Bureau of Mines. Of these, 20 were in Arkansas, 2 in Colorado, 2 in New Mexico, 16 in Virginia, and 1 in Washington. In the field as a whole, the classification by size of output is as follows:

NUMBER AND PRODUCTION OF SEMIANTHRACITE AND ANTHRACITE MINES OUTSIDE OF PENNSYLVANIA CLASSIFIED BY SIZE OF OUTPUT IN 1936

Classes	Mines		Production		
	Number	Percent	Total net Tons	Average per mine (Net tons)	Percent
1 A (over 500,000 tons)					
1 B (200,000-500,000)					
2 (100,200-200,000)					
3 (50,000-100,000)	3	7 3	160,261	53,420	30 8
4 (10,000-50,000)	13	31 7	324,098	24,931	62 2
5 (Under 10,000)	25	61 0	36,093	1,444	7 0
Total	41	100 0	520,452	12,694	100 0

Length of working day.—The following table summarizes the replies of mine operators to the question, "Number of hours operated per shift."

In the mines in the semianthracite and anthracite fields outside of Pennsylvania replying to the inquiry in 1936, in- [fol. 206] cluding those reporting a day of irregular length, it was found that 70 per cent of the men employed were in 7-hour mines and that the weighted average working shift was 7.3 hours.

The established working day does not of itself measure the length of time that men actually work or the time that they are underground, because of the possibility of overtime, because the mine may sometimes shut down before the full day is over, because the miner may go home before the mine stops, and because he spends a considerable time in going to and from his place of work underground. As interpreted in the wage agreements, the day means the hours of labor at the usual working place, exclusive of any time for lunch and exclusive of the time spent in going from the entrance of the mine to the working place and back again (see Coal in 1930, p. 656).

[fol. 207]

Number of Semianthracite and Anthracite Mines Outside of Pennsylvania Having Established Working Shift of Certain Length and Number of Men Employed Therein, in 1936.

State	7 hours		8 hours		9 hours		Not reporting and all others*		Total	
	Mines	Men	Mines	Men	Mines	Men	Mines	Men	Mines	Men
Arkansas	12	1,022	..	..	..	..	8	25	20	1,047
Colorado, New Mexico and Washington	4	155	..	..	..	..	1	7	5	162
Virginia	..	..	6	479	..	..	10	38	16	517
Total	16	1,177	6	479	..	..	19	70	41	1,726

* Includes mines where the day was more than 9 or less than 7 hours or was irregular, or where it was changed during the year; also cases (1) where the operator has included time when the men were entering or leaving the mine, (2) where the operator has reported the time of certain occupations that work longer than other employees, as in stripping overburden, or (3) where the work is staggered and two crews of men overlap. Many of the smaller mines failed to answer the question.

[fols. 208-210]. ANTHRACITE OUTSIDE OF PENNSYLVANIA AND SEMIANTHRACITE LOADED FOR SHIPMENT IN 1936 BY INDIVIDUAL RAILROADS, AS REPORTED BY OPERATORS, IN NET TONS.

Railroads	State	Quantity
Atchison, Topeka & Santa Fe	New Mexico	38,416
Chicago, Milwaukee, St. Paul & Pacific	Washington	
Denver, & Rio Grande Western	Colorado	
Dardanelle & Russellville	Arkansas	101,610
Montana	Arkansas	
Missouri Pacific	Arkansas	173,805
Norfolk & Western	Virginia	44,265
Virginian	Virginia	121,686
Total		479,782

Strikes:

Brief strikes in 1936 were reported by the operators of a few mines in Arkansas, involving some 240 men and averaging about 7 days lost per man on strike and less than 2 days lost per man employed in the anthracite mines of the State. No strikes were reported in the other States in these fields.

[fols. 211-218] Mr. Adamson: Plaintiff offers in evidence Plaintiff's exhibit number five, which is "Anthracite and semi-anthracite outside of Pennsylvania Tables, 1938, United States Department of the Interior, Harold L. Ickes, Secretary, Bureau of Mines, by John W. Finch, Director" issued by the United States Department of the Interior, Bureau of Mines.

Mr. Sher: We make the same objection, and we waive any objection as to authenticity.

The Court: The same ruling.

Exhibit Number Five

The above document offered in evidence as plaintiff's Exhibit Number Five, was objected to by the defendant and the objection sustained by the Court, the document was excluded, and the same is in words and figures as follows: [fol. 219] Mr. Adamson: Co-counsel has just suggested, in

* * * * * * *

order to keep the record, we should make an offer to prove.

The Court: No, I don't think so.

Plaintiff's Exhibit Number Six

Marked for identification.

Mr. Adamson: We offer in evidence Plaintiff's exhibit number six, which is a certified copy of the Findings of Fact and Conclusions of Law, in a hearing before the United States Department of the Interior, National Bituminous Coal Commission, In the Matter of the Application of the Anthracite Coal and Briquetting Corporation, Petitioner, for Designation of Certain Coal as being Anthracite and not Bituminous Coal, being Docket No. 34.

This is a certified copy of the Findings of Fact and Conclusions of Law on a hearing in another case involving, by the old commission, involving a classification under the Act.

Mr. Sher: We make the same objection, if the Court please.

The Court: And there will be the same ruling.

The above document offered in evidence as Plaintiff's Exhibit number six, was objected to by defendant, which objection was by the Court sustained, the document excluded, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER SIX

[fol. 220] UNITED STATES DEPARTMENT OF THE INTERIOR
National Bituminous Coal Commission

Docket No. 34

In the Matter of the Application of the Anthracite Coal and Briquetting Corporation, Petitioner, for Designation of Certain Coal as being Anthracite and not Bituminous Coal.

Findings of Fact and Conclusions of Law

This matter having duly come on for hearing on the 9th day of April, 1935, before Commissioner George Edward Acret, pursuant to and for the purposes stated in an order for and notice of hearing dated March 28, 1936, on file herein and D. Gray Langhorne, Esq., appearing on behalf of the petitioner, the Anthracite Coal and Briquetting Corporation and the matter having been submitted, the Commission now makes its findings of fact and conclusions of law as follows:

Findings of Fact

I

The Anthracite Coal and Briquetting Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Virginia.

[fol. 221]

II

The said corporation is engaged in the business of mining, producing and selling coal in said State.

III

It is the lessee and operator of a coal mine known as the Empire Mine, located on Little Walker Mountain, approximately 8 miles northeast of Pulaski, Virginia, in a region generally identified on maps of the United States Geological Survey as the Brushy Mountain Field, under the terms of leases entered into by it on January 1, 1932, with James L. Dent, et al., and May 31, 1935 with The Bertha Mineral Company, a corporation, of New Jersey.

IV

The property conveyed by said lease and upon which the Empire mine is situated is described as follows:

Tract 1

Situated in Pulaski County, Virginia, on the south side of Walkers Little Mountain and North of Robinson's tract,

and being the Mountain Land inherited by Evelyn K. Mebane, deceased, M. K. Langhorne, deceased, and the said Lizzie K. Laughon and James L. Kent, from their father, D. C. Kent, late of Pulaski County, Virginia, and being the coal on the land, the surface of which was partitioned among the said Lizzie K. Laughon, Evelyn K. Mebane, M. K. Langhorne and James L. Kent by a certain deed dated May 11, 1914, and of record in Pulaski County Clerk's office in deed book 35, page 78, said land partitioned as [fol. 222] aforesaid, on which said coal is situated, being fully described by metes and bounds on a blue print attached to said deed, to which reference is made for a more particular description thereof; and also all the coal of every character and description lying on, in, under and upon a certain other tract of land containing eighty (80) acres, more or less, adjoining the aforesaid land and being a narrow strip situate North of the farm of J. R. K. Bell and west of the lands hereinbefore described and also located on the south sides of the said Walker's Little Mountain, all of said lands being described in a plat attached to a certain deed of lease from the parties of the first part and others to Virginia Anthracite Coal Corporation, dated August 22, 1919, recorded in said Clerk's office in deed book 42, page 470.

Tract 2

That part of the Thurston tract in said county bounded as follows: Beginning at a poplar, a corner of D. C. Kent, 750 acre tract, and a corner of the Oscar Laughon tract on [fol. 223] which the mineral *are* owned by the Bertha Mineral Company and located on the Southeastern slope of Little Walker Mountain in Pulaski County, Virginia. Thence with the line of the latter tract North twenty six degrees thirty-two minutes west (N. 26-32' W.) fifteen hundred forty feet (1540'); thence leaving the line of the Laughon tract South forty four degrees eighteen minutes West (44-18') twenty eight hundred forty feet (2840'); thence south thirty five degrees East (35.00) fourteen hundred feet (1400') to a point in the southern boundary of the Laughon tract; thence, with the line of the latter, North forty four degrees eighteen minutes East (44.18') twenty five hundred seventy feet (2570) to the beginning.

Both of the foregoing tracts are set forth with particularity in the maps introduced at the hearing in this cause and identified as petitioner's exhibits No. 14 and No. 15.

V

Underlying the land on which petitioner is the lessee are two beds of coal, known and referred to as the Merrimac bed and the Langhorne bed, the Langhorne bed underlies the Merrimac bed.

VI

All of the coal which the petitioner mines or produces is taken from the Langhorne bed and none from the Merrimac bed.

[fol. 224]

VII

The Technical Committee for the Classification of Coal was organized in 1926 under the sponsorship of the American Society for Testing Materials for the purpose of determining a definite formula for the classification of coal and the establishment of an official table designating the rank of coal based on its findings; included in the membership of said Committee, are representative scientists and technological experts from producer and consumer groups as well as Government representatives from the Bureau of Mines and the United States Geological Survey; the Chairman of said Committee is A. C. Fieldner, Chief Chemist of the Bureau of Mines.

VIII

Said Committee has evolved a formula for determining the classification and rank of coal and a classification table based on the application of said formula.

IX

Said formula determines the fixed carbon content of a given sample of coal calculated on a dry mineral-free basis.

X

The table of classification which it has adopted establishes 86% of fixed carbon on a dry mineral-free basis as the median between anthracitic and bituminous coals.

XI

Coals having a fixed carbon content on a dry mineral-free basis from 86% to 92% are classified and ranked as semi-anthracite and coals whose fixed carbon content on a dry

[fol. 225] mineral-free basis falls below 86% and above 77% are classified as low volatile bituminous (semi-bituminous) coals.

XII

Said committee has also determined that all coals ranked in the anthracite group (86% fixed carbon on a dry-mineral-free basis or above) are non-ag-lomerating and that in doubtful or border-line cases, the ultimate determinant is the ag-lomerating test.

XIII

Nine samples of coal were taken from the Empire Mine operated by the petitioner by representatives of the Bureau of Mines.

XIV

Said samples were subjected to a chemical analysis by the Bureau of Mines and official analyses thereof are on file at the Bureau of Mines.

XV

Under the formula adopted by the Technical Committee for the Classification of Coal, all of said analyses disclose a fixed carbon content on a dry mineral-free basis of more than 86% and less than 92% within an approximate average of 88%.

XVI

All of said samples have been subjected to the aglomerating test by the Bureau of Mines and have been found to be non-ag-lomerating.

[fol. 226] And for conclusions of law, the Commission concludes as follows:

Conclusions of Law

I

That portion of the Langhorne bed which underlies the Empire mine operated by the petitioner and more fully described in finding of fact No. 4 is semi-anthracite coal and not bituminous coal within the meaning of Section 19 of the Bituminous Coal Conservation Act of 1935.

The Anthracite Coal and Briquetting Corporation to the extent that it mines and produces coal from the Landhorne bed of the Empire Mine is not subject to and is exempt from

the provisions of the Bituminous Coal Conservation Act of 1935.

Dated this 13th day of April, 1936.

The undersigned, being the Commissioner and only person who conducted the hearing herein, hereby recommends the adoption by the Commission of the above Findings.

George Edward Acret, Commissioner.

The above Findings are hereby adopted by the National [fol. 227] Bituminous Coal Commission in regular meeting assembled on this 13th day of April, 1936.

C. F. Hosford, Jr., Chairman.

Attest: A true copy. N. W. Roberts, Secretary.

I hereby certify that this is a true and correct copy of the Findings of Fact and Conclusions of Law which were entered in Docket No. 34 of the National Bituminous Coal Commission on April 13, 1936.

(Signed) W. B. Roberts, 3rd, Records Section, Bituminous Coal Division.

[fol. 228] Mr. Adamson: Mark exhibit number seven.

Plaintiff's Exhibit Number Seven marked for identification.

Mr. Adamson: We offer in evidence Plaintiff's exhibit number seven, being pages 182, 183, 184, 185, 186, and part of 187, of the Fuel Manual, and being a copy of Publication No. 4D issued by the National Fuel Administration in the year 1918.

The Court: It appears to be a part of a bound volume; what is the——

Mr. Adamson: That is the Fuel Manual that was gotten out by the National Coal Commission which contains all of these orders that were issued by the National Fuel Administrator during the War.

The Court: Is that sufficient identification for the record?

Mr. Sher: We make no objection on the ground it is not a true copy—Did you finish your offer?

[fol. 229] Mr. Adamson: I was just saying, this is an offer of the classification; they classified at that time Spadra coal as anthracite coal and set the price.

Mr. Sher: We make the same objection we made to the other offer plus the addition that there is not anything to

show what the standards of classifications were, that were used by the Fuel Administrator during the War, as the additional objection. However, we make no objection on the ground it is not properly identified.

The Court: The same ruling.

The above exhibit introduced in evidence as as Plaintiff's Exhibit Number Seven, the same was objected to by defendant, which objection was sustained by the Court and the exhibit excluded, and the same is in words and figures as follows:

PLAINTIFF'S EXHIBIT NUMBER SEVEN

[fols. 230-245] On April 22 Publication No. 4D was issued. It is entitled "Coal Prices at the Mines, In Effect April 22, 1918." It follows:

United States Fuel Administration

Bituminous Coal

Prices in effect April 22, 1918, F. o. b. mine basis for ton of 2,000 pounds. These prices do not include the 45 cents per ton allowed in President's order of October 27, 1917, Publication 2-A. This increase applies to all mines except those indicated by (*).

The dates on which modifications of prices became effective are given in Publication No. 4-D-1, Series 1918.

. . . . . .

[fols. 246-247] ANTHRACITE COAL

The prices for the Bernice mines and Spadra field in the State of Arkansas are as follows (prices f. o. b. mines and nothing to be added):

District	Grate	Egg	Stove	No. 4	Pea	Buck	Slack
Bernice	$7 30	$7 55	$8 30	$8 30	$6 30	$2 85	$2 50
Spadra	$6 80	6 80		7 30	4 80	.....	2 30

The prices for all Arkansas anthracite coal, save slack coal, are subject to the following reductions: 90 cents in April, 1918; 75 cents in May, 1918; 60 cents in June, 1918; 45 cents in July, 1918; 30 cents in August, 1918; 15 cents in September, 1918.

. . . . . .

[fol. 248] Plaintiff's Exhibit Number Eight marked for identification.

Mr. Adamson: We offer in evidence the plaintiff's exhibit number eight, which is a stipulation entered into between the plaintiff and the defendant.

The Court: In the present case?

Mr. Adamson: In this case. It is a stipulation containing three stipulations covering the formal matter of the list of the coal, also covering assessments that have been made under the 19½% up to the present time, and also the fact that there are no Rules and Regulations in effect at this time.

The Court: I think that is to be read, probably it should be.

Mr. Adamson: With the Court's permission, may I have one of the other men make the statement?

The Court: Oh yes.

Mr. Patterson: (Reads exhibit number eight to the Court).

The above stipulation was read to the Court, and the same is in words and figures as follows.

PLAINTIFF'S EXHIBIT NUMBER EIGHT

[fol. 249] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY

vs.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas

Stipulation

Comes now the plaintiff by its attorneys, and comes also the defendant by his attorneys, and the parties hereto agree that for the purpose of trial and final hearing of this cause, the following facts, in addition to those admitted in the answers, are true, and all parties reserve the right to object to the introduction of any part or portion of this stipulation on the ground that the facts therein contained are

immaterial and irrelevant and not competent evidence in this cause:

1. That the coal mined by the plaintiff is owned by the Ozark Coal Company and leased to plaintiff, and by the terms of said lease plaintiff is required to pay royalty at the rate of 25¢ per ton for each ton of coal mined and removed, and must produce a sufficient amount of coal to pay the owner a minimum royalty of five thousand dollars per year. By supplemental agreement, the royalty has been [fol. 250] reduced to 15¢ per ton for each ton of coal while the mine is in the development stage, the minimum royalty, however, still stands at $5,000.00 per year.

2. That the defendant here served notice and demand on tax form 17 on the plaintiff herein on the dates and in the amounts as follows: May 3, 1938 in the amount of $14,031.37, coal tax, $532.14 penalty, and $186.23 interest, total $14,749.64; that on to-wit: May 5, 1938, the said defendant herein filed in the office of the Circuit Clerk and Recorder of Johnson County, Clarksville, Arkansas, notice of tax lien under the internal revenue laws, form 668, in the amount of $15,487.12, together with a filing fee of $1.50, totaling $15,488.62; which said sum, together with taxes for March, 1938 levied and assessed in the sum of $1,895.95, levied and assessed for April, 1938, $1,161.65, levied and assessed for the period May, 1938, through October, 1938, in the sum of $15,807.69, levied and assessed from November, 1938 through April, 1939 inclusive, in the sum of $25,172.27, and levied and assessed from May, 1939, through September, 1939, in the sum of $10,573.00, amounts to a total of taxes levied and assessed to this date in the sum of $70,367.68; that all of the said taxes hereinabove mentioned were levied and assessed by virtue of section 3 (b) of said act; that the plaintiff has refused and continued to refuse to pay said tax or any part thereof.

3. That the National Bituminous Coal Commission by its [fol. 251] order No. 113 issued December 9, 1937, fixed minimum prices and marketing rules and regulations in District No. 14 where plaintiff's mine is located, and the said National Bituminous Coal Commission by its order duly entered revoked minimum prices and marketing rules and regulations for said district 14, as of February 25, 1938; that since the aforesaid date no minimum prices or

marketing rules and regulations under said act have been in force and effect, and no minimum prices or marketing rules or regulations are at the present time in force and effect.

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreeing as to any legal rights resulting therefrom, but said legal rights and regulations are to be determined from the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Adamson, Blair & Adamson, Patterson & Patterson.
By (signed) George O. Patterson, Attorneys for Plaintiff. (Signed) Robert E. Sher, Attorneys for Defendant.

[fol. 252] Mr. Adamson: I don't know exactly how to make this record——

Mr. Sher: This probably arises in this way—Mr. Adamson wanted to make an offer to prove as to additional facts as to the properties of the coal by witnesses who would be here, and we agreed that we would permit him to make the offer without having the witnesses present in Court, and he said he didn't know of any such practice, and I told him——

The Court: I see it constantly appearing in records in our Court and it is constantly stipulated if a certain witness was present he would testify as follows.

Mr. Adamson: Now that I understand.

Mr. Sher: We don't go quite that far, of course, if he were—I might suggest, your Honor, that in a certain case there was a line of evidence offered that was objected to by the Government and the objection sustained after considerable argument, and there were thirty witnesses offered to go to that particular question, and we agreed with counsel they could make offer of proof without bringing them to Washington, and that was satisfactory in that case, and [fol. 253] no objection made. I don't want to agree if the witness were here——

The Court: There are certain things he would testify you agree he would testify to?

Mr. Adamson: That has always been our method.

The Court: What is it you say he will testify to; is it written out there?

Mr. Adamson: Yes sir, it is written out and signed by the witness.

The Court: Then you will have to pick out what you think he wont testify to.

Mr. Sher: We object to all of this.

The Court: Sure, and that objection will be preserved.

Mr. Adamson: I cannot see where it would hurt them to make the statement you make; they don't agree that it is [fol. 254] true, it does not bind them in any way, they just simply agree that the witness if present would testify to that particular state of facts.

The Court: Well, they are willing to say that he would testify, but other state of facts they say he would not testify to.

Mr. Adamson: No, they don't object to anything, they say——

The Court: Is that correct; you admit if he were here he would testify to that state of facts?

Mr. Sher: On direct examination.

The Court: If you so admit, then the record must be made that way, and the record shows that it is admitted that if the witness were present, he would testify in chief as stated. Have you numbered the exhibit? (Clerk gives number.) In exhibit number nine, and you can make any statement you want to.

[fol. 255] Mr. Adamson: This is a statement, if the Court please, by Dr. Branner, the State Geologist of the State of Arkansas, in which he sets out his qualifications, his familiarity with the Spadra field, and that it has always been known as anthracite (coal) and classified as anthracite.

Mr. Sher: We will make the same objection without objecting to the authenticity.

The Court: That objection is sustained.

The above statement by Dr. George C. Banner, State Geologist for the State of Arkansas offered in evidence by the plaintiff as Exhibit number nine, and the same was objected to by counsel for the defendant, the objection was sustained by the Court, and the same is in words and figures as follows:

Plaintiff's Exhibit Number Nine

[fol. 256] Statement of George C. Branner

My name is George C. Branner. I live at 3121 Ozark Avenue, Little Rock, Arkansas. My business address is 447 State Capitol Building, Little Rock, Arkansas.

I am State Geologist for the State of Arkansas and have been continuously serving in this position since the third day of July, 1923. My preliminary education was obtained at Leland Stanford University from which I graduated in 1915, majoring in geology for three and one-half years and in engineering for two and one-half years. Besides my college education in geology, I occupied the position of Assistant Geologist on the Stanford Scientific Expedition to Brazil in 1911 which was under the direction of John C. Branner, Professor of Geology, at Stanford University. After graduation, I acted as his assistant in private geological work in Arkansas for two years.

I am a member of the Geological Society of America, the Society of Economic Geologists, the American Institute of Mining and Metallurgical Engineers, and am past president of the Association of American State Geologists

I first began a study of coal in the State of Arkansas about the year 1923 and in the discharge of my duties have had occasion to examine the coal seams and visit certain of the mines in what is known as the Spadra Coal Field in western Arkansas. In making a study of the Spadra field, I have had occasion to calculate the classification of the coals by rank.

[fol. 257] I am familiar with the following systems of classification of coal:

(1) The Frazer System published in 1879 which is based on the ratio of the fixed carbon to the volatile matter determined by the proximate analysis of the coal;

(2) The Frazer system as modified by the so called Parr formula published in 1928 which uses the proximate and ultimate analyses of the coal to determine the fuel ratios; and,

(3) The A. S. T. M. system published in 1937 which is a refinement of the Frazer system as modified by the Parr formula and, in addition, uses physical differences of coal for calculating the classifications below the medium volatile bituminous group.

The following table shows the comparison of fuel ratios used by the Frazer system and the A. S. T. M. system for the meta-anthracite and anthracite and the semi-anthracite groups:

	Frazer system	A. S. T. M. system
Meta-anthracite and anthracite	12 to 100	11.5 to 100
Semi-anthracite	8 to 12	6.14 to 11.49

The Frazer system achieved common usage and was used in U. S. Geological Survey Professional Paper 100-A, "The Coal Fields of the United States," by Marius R. Campbell, published in 1922. This report definitely classifies coal from [fol. 258] the Spadra District as of semi-anthracite rank (page 27).

I have endeavored to determine the extent to which the A. S. T. M. system is used in other states. From written statements obtained it appears that in 13 states (exclusive of Arkansas) which produce about 85 per cent of the total coal production in the United States, four state geological surveys, viz., Pennsylvania, Illinois, Colorado and Iowa, use the A. S. T. M. system of classification. The remaining nine state geological surveys apparently have not had occasion to give out official classifications of coal produced within their states. Based on conversations with geologists during the past year it is my opinion that the use of the A. S. T. M. specifications is steadily finding wider use.

Of all methods in use for classifying coals, I believe the A. S. T. M. System to be the best method of classification that has been arrived at. The U. S. Geological Survey in April, 1938, urged the adoption of this A. S. T. M. system by "all individuals and groups," generally over the country. This system has also been adopted by the U. S. Bureau of Mines as a standard in its work in classifying coal.

Under the A. S. T. M. system for defining semi-anthracite coal, such coal is defined as that having a content, on a mineral matter free basis, of 86 per cent or more and less than [fol. 259] 92 per cent dry fixed carbon and 14 per cent or less and more than 8 per cent of dry volatile matter. This applies to non-agglomerating coal. If agglomerating, the coal with the content referred to is placed in the low volatile bituminous group.

The mine of the Sunshine Anthracite Coal Company is located in what is known as the Spadra field in Western

Arkansas. Its coal closely approximates the character of coal produced by other mines in the Spadra field. I have been to and in the Sunshine Anthracite Coal Company's mine and have had occasion to examine analyses of coal from the Spadra field. Among these are those included in U. S. Geological Survey Bulletin, 326, "The Arkansas Coal Field," published in 1907; U. S. Geological Survey Professional Paper 100-A, "The Coal Fields of the United States," published in 1922; U. S. Bureau of Mines Technical Paper 416, "Analyses of Arkansas Coals," published in 1928 and U. S. Geological Survey Bulletin 847-E, "Geology and Mineral Resources of the Western Part of the Arkansas Coal Field," published in 1937. The conclusions reached from a study of each one of these analyses are that, under the A. S. T. M. system of classification, the Spadra, Arkansas, coal is of semi-anthracite rank.

[fol. 260] I do not regard the classification of Spadra coal as semi-anthracite as being in any way unusual or unexpected for the reason that, in common with other regions containing coal of the anthracite class, the rocks of the central portion of the Arkansas River Valley in which the Spadra field is located has been subjected to intense folding and the coal has been de-volatilized to a rather high degree for that reason. The intensity of the folding diminishes to the west and the coals diminish progressively in hardness in passing from the eastern end of the Arkansas coal basin into Oklahoma. The coals between the Oklahoma line and the Spadra field are very largely of low volatile bituminous rank and one area, the Bates-Coaldale, produces coal of medium volatile bituminous rank. This is near the Oklahoma line about 60 miles southwest of the Spadra field, and is in the eastern edge of the Oklahoma Coal Basin referred to.

Assuming that a given coal had been analyzed and the analysis on a dry mineral matter free basis showed the fixed carbon content of 87.55 per cent and the volatile matter content of 12.76 per cent, which coal is non-agglomerating, in my opinion, the proper classification for such coal is in the semi-anthracite group of the anthracite class of coal.

[fol. 261] As far as the history of the Spadra, Arkansas, coal field is concerned, to my knowledge, the coal produced in this field where the Sunshine Anthracite Coal Company's mine is located, has been commonly considered semi-anthracite coal by geologists, and also as a matter of trade classi-

fication so far as my knowledge extends as to this usage. In the trade field, it is often referred to as anthracite coal.

The Arkansas Geological Survey report for 1910, entitled "Coal Mining in Arkansas," by A. A. Steel, page 8, refers to the coal in the eastern part of the Arkansas coal field as of semi-anthracite rank.

Signed this 12th day of February, 1940.

(Signed) George C. Branner.

[fol. 262] Mr. Adamson: Now, if the Court please, may we have a short recess? I think we are through.

The Court: The Court will stand recessed; you will indicate when you want it reconvened.

Mr. Adamson: Ten minutes will be enough.

The Court: Then recess for ten minutes.

Here the Court was recessed for ten minutes, after which it reconvened pursuant to order for recess, and proceeded as follows:

The Court: You may proceed.

Mr. Adamson: We rest, your Honor.

Whereupon, the defendant, to sustain the issues upon his part, proceeded as follows:

Mr. Sher: We offer in evidence certified copy of the transcript of the record in the case of the Sunshine Anthracite Coal Company versus Harold L. Ickes, a certified copy by the Clerk of the United States Supreme Court. This was [fol. 263] formerly known as Sunshine Anthracite Coal Company against the Bituminous Coal Commission.

Mr. Adamson: If the Court please, we object for the reason that it is immaterial and irrelevant and for the further reason that it shows upon its face that the parties are not the same, that the subject matter is not the same, and there is an insufficient showing of the jurisdiction of the Court, that is a record at the former proceeding, and we are making the objection as to the whole conclusions and findings and further objection to the evidence contained in there, and to any showing that the witnesses would be unavailable for this hearing.

Mr. Sher: This is right in line with the earlier ruling of the Court, that the pleadings should not be stricken, therefore if the facts can be alleged, they can be proved.

Mr. Adamson: If your Honors please, to be consistent with your former ruling the evidence——

The Court: The objection is overruled, and the exhibit is received in evidence.

[fol. 264] DEFENDANT'S EXHIBIT No. 2

The above exhibit admitted in evidence, and is attached as Vol. II of this transcript.

[fol. 265] Mr. Sher: The parties agree that the United States Supreme Court denied the petition for certiorari in the case of the Sunshine Anthracite Coal Company against Ickes on November 6, 1939.

Mr. Adamson: I do not remember the date, but——

The Court: The record will so show.

Mr. Sher: Now we have here a stipulation which we want to offer.

DEFENDANT'S EXHIBIT NUMBER THREE

The above stipulation marked for identification.

Mr. Adamson: No objection.

Mr. Sher: I will read this to the Court. Now this is a rather lengthy recital of the conditions of the coal industry but I think I ought to read it to the Court.

The Court: Yes, I think so.

The above stipulation admitted in evidence as exhibit number three, the same was read to the Court by Mr. Sher, and is in words and figures as follows:

DEFENDANT'S EXHIBIT NUMBER THREE

[fol. 266] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity. No. 2949

THE SUNSHINE ANTHRACITE COAL COMPANY, Plaintiff,

v.

HOMER M. ADKINS, as Collector of Internal Revenue for the District of Arkansas, Defendant

STIPULATION

It is hereby stipulated and agreed by and between the parties, by their respective counsel, that:

1. Practically the entire output of the coal produced by the plaintiff at its mine in Arkansas is sold to purchasers outside the state of Arkansas.

2. It is further stipulated that the following facts with respect to conditions in the coal industry are true:

Bituminous coal is the source of nearly one-half of the energy used in the country. It supplies about 75 per cent of the energy used by the public utilities and in manufacturing. It is essential to the industrial life of the Nation and furnishes a great part of the fuel used for household heating.

It is of great importance to transportation itself. It furnishes about 83 per cent of the fuel used by locomotives operating on the railways. Over a period of years the amount of coal transported by the railroads has ranged from 26 per cent to 33 per cent of their total freight and has furnished from 16 per cent to 19 per cent of the total revenues of the carriers.

[fol. 267] Bituminous coal is found in 26 states of the Union, although the great part of it today is produced in four states: Pennsylvania, Illinois, Kentucky, and West Virginia. It is transported to practically every state in the country, and the coal produced in the different states competes in market with coal produced in other states.

The sales have ranged from nearly 600,000,000 tons down to nearly 350,000,000 tons. About 25 per cent of the total production is sold to interstate commerce carriers. About two-thirds of the remaining production, i. e. 50 per cent of the total production, is sold in interstate commerce, and the remaining 25 per cent of the total production is sold in local commerce.

It is the practice to sell coal before it is mined. In many mines the coal is graded, because the different sizes are more valuable in the market than the run-of-mine coal, and the practice is before operating the mine to obtain contracts for the different kinds of coal. Sometimes it is impossible to get the contracts in advance for all of the sizes, and the mine is compelled to operate.

The unsold coal accumulates until it so clogs the mine that operations are suspended, or that coal is shipped out, consigned to the owner or his agent, in the hope that it will be sold before it reaches its destination. If not, there [fol. 268] are heavy demurrage charges, and there are also

charges due to a change in consignment. So, there is a very decided pressure to sell that coal as quickly as possible, and it is referred to as "distress coal." Sometimes it is offered for sale to a number of brokers at the same time, and so far as the purchasers know, each broker is selling different coal. The result is that distress coal has a very great effect upon the market price and depresses it.

About three-fourths of the coal is sold upon contracts and upon contracts made in advance, while the remaining coal is sold "spot".

There are other differences which distinguish coal to some extent from other commodities. The cost of the labor is the greatest item in producing coal. It is about 60 per cent.

The closing down of a mine is a difficult and very expensive thing. The pumps must be kept going, and there are various items of supervision such as to see that the walls and ceilings do not collapse, and the result is that the expense of running the mine while it is not operating is so heavy that it is usually considered cheaper to keep the mine going, even though the price received for the coal is less than the actual cost if all items of overhead are taken into consideration.

[fol. 269] There is a very great over-capacity in the mines of the country. The mines are capable of producing a much greater amount of coal than is consumed.

During the War the demand for coal grew enormously, with the result that prices soared. Finally Congress passed legislation for the purpose of regulating the price of coal, but it was some months after the Fuel Administration began to operate before the difficulties were corrected.

After the War there were a number of strikes of some importance. Wage agreements had usually been made for a period of two years, and there was always likely to be some suspension at about the time of the termination of the wage agreement. Frequently it was not renewed before the expiration.

In 1919 there did occur a very serious strike. That was a general strike of the union miners. It began about November 1, 1919, and lasted for about six weeks. Some 400,000 men altogether were on strike in about 22 different states. Before that strike was over, manufacturers in some places had to close down because of the shortage of coal.

In 1920, before the effects of that strike were over, the Government undertook to fix the prices of coal again.

In 1920 or 1921, the President appointed a Coal Commission which undertook to study the difficulties between the operators and the miners.

[fol. 270] In 1922 another suspension occurred at the expiration of the wage agreement on March 31, 1922. About 460,000 miners were out, and at one time about 73 per cent of the productive capacity of the mines was closed down.

On September 22, 1922, Congress passed an act which created the office of Federal Fuel Distributor, and also appointed the United States Coal Commission, which made an investigation.

During that suspension the price of coal increased, and some buyers were unable to get the grades of coal to which they were accustomed. Some of the coal sold was impure, and there were some breakdowns on some of the locomotives on the railroads. At both of those times there was a real threat of a suspension, not only of the commerce of coal itself, but of the commerce which depended on the use of coal in order to move; and that threat was overcome by the action of the President in one case and of Congress in the other.

Between 1924 and 1927 there were a number of local strikes or suspensions, and after the expiration of the Jacksonville agreement in 1927 there were still other suspensions.

Prior to 1917 the industry had grown a great deal. Even before that time, and from that time on, there had been a very great growth in Kentucky, West Virginia, and some southern states, some due to natural causes—the [fol. 271] building of the railroads to the mines and the building up of the mines—and some due to the competitive conditions.

Between 1924 and 1927 a great many of the union mines abrogated their contracts or suspended operations and later reopened on a non-union basis. As a result, a great deal of the sales of the mines that had been union before that time went to the mines in the other states that had been non-union.

By 1927, after the expiration of the Jacksonville agreement, practically all of the territory, or the very great part of the territory, that had theretofore been union, became non-union, and thereafter some of this commerce which had gone to Kentucky and West Virginia then went back in the normal course to Pennsylvania, Illinois, and the other states.

Between 1924 and 1929, there was no decrease in the sales of coal; the sales were over 500,000,000 tons in each one of those years.

From 1917 up to about 1923, the business as a whole had been very profitable. There were some years when the net profits of the entire industry were in the neighborhood of $250,000,000. In that year the wages were about $850,000,000 and the sales were nearly double that, or around $1,500,000,000. During this period from 1924 to 1929, when the production continued at about the same amount [fol. 272] there were heavy losses. Between 1924 and 1929, there was a loss in every year to the industry as a whole.

During that same period the average price at the mine decreased from $2.68 to $1.78, a decrease of 90 cents, or about 31 per cent. During the same period the total wages decreased from about $850,000,000 to $588,000,000, a decrease of about the same percentage. The number of miners decreased about 200,000. So, with the same production, this meant that the miners were working more days per year.

Also during that same period, the approximate period between 1923 and 1929, the number of mines decreased about 3,300, about 30 per cent.

The losses after 1929 became heavier, and they continued to be very heavy until the year 1934, when the N. R. A. became effective.

Throughout this same period Congress made a large number of investigations—either Congress itself, through a committee, or through some body appointed by Congress, or a commission appointed by the President. There were 12 or 14 of those during the period from 1918 down to 1935, and various suggestions as to various remedies were made.

During this period from 1919 down to the adoption of N. R. A., there were a number of things which were injurious to the commerce in coal, and to the entire commerce of the nation. Whenever a wage agreement expired there was a threat, or at least a fear, that a very substan- [fol. 273] tial part, if not all, commerce might be suspended until the wage agreement should be renewed. In 1920 and 1922 these threats grew to very serious proportions. The Presidents exercised their good offices, and Congress passed a statute as a result of which investigations were made, and the suspensions ceased and commerce in coal was renewed, and the threat of interference with that commerce,

and with the bulk of the commerce of the railroads, ceased, but there was that threat on each occasion. As it was, there were many interruptions to the commerce, and real obstructions to the commerce. Consumers were compelled to lay in stocks of coal. Of course, the commerce of the carriers themselves fell off. Prices increased. Certain of the carriers in 1920 paid about 25 per cent more for their contract coal and about 50 per cent more for their spot coal than they paid during the preceding year, and they probably suffered less because of their great buying ability, than other consumers.

By agreeing to the statements contained in the above stipulations, the parties hereto are not agreement as to any legal rights resulting therefrom, but said legal rights and relations are to be determined from the facts set forth in these stipulations and the facts proved at the trial and the law applicable thereto. Any party to this cause shall have [fols. 274-275] the right at the final hearing to introduce any additional or further evidence in this cause, providing that the same is not in contradiction of any of the facts herein stated.

Patterson & Patterson, Adamson, Blair & Adamson, Attorneys for Plaintiff. Robert E. Sher, Harold ——, Attorneys for Defendant.

[fols. 276-277] Waiver of Objection to Jurisdiction, etc.

Mr. Sher: I would like to have the record to show that the Government waives its objections to the equitable jurisdiction of the Court and waives its defense under Section 3224 of the Revised Statutes.

[fol. 278] [File endorsement omitted]

In United States District Court

[Title omitted]

Petition for Appeal—Filed March 4, 1940

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and feeling itself aggrieved by the final decree

of the Court entered herein on the 16th day of February, 1940, prays an appeal therefrom to the Supreme Court of the United States. The particulars wherein it considers the final decree erroneous are set forth in its assignment of errors on file and to which reference is made.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf to the Supreme Court of the United States for the correction of the errors complained of and herewith duly assigned, be allowed and granted; and that an order be had fixing the amount of the bond and security to be given by this plaintiff as appellant and conditioned as the law directs, and it prays a reversal of said decree.

The Sunshine Anthracite Coal Company, by Henry Adamson, George O. Patterson, Attorneys.

[fol. 279] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL } Filed March 4, 1940

The defendant in the above entitled case is hereby notified that the plaintiff has appealed from the decree of the court as rendered on the 16th day of February, 1940, and that said appeal will be to the Supreme Court of the United States, in accordance with the citation as issued in this case.

The Sunshine Anthracite Coal Company, by Henry Adamson, George O. Patterson, Attorneys.

Service of the above notice of appeal accepted this the 4th day of March, 1940.

Sam Rorex, U. S. Attorney, of Counsel for Defendant, by (S.) Leon B. Catlett, Asst. U. S. Attorney.

[File endorsement omitted.]

[fol. 280] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING APPEAL—Filed March 4, 1940

It appearing to the Court in the above cause that the plaintiff herein has filed its petition for appeal to the Su-

preme Court of the United States, and has filed therewith its assignment of errors, and also its statement as to the jurisdiction of the Supreme Court, duly disclosing that the Supreme Court of the United States has jurisdiction, upon appeal, to review the decree in question.

It Is Hereby Ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the decree rendered in said cause on the 16th day of February, 1940, and that said plaintiff give bond with good and sufficient surety in the sum of Two Hundred Fifty ($250.00) dollars that it will, as appellant, prosecute its appeal to effect and answer all damages and costs if it fails to make its appeal good; and now plaintiff files herein its bond in the sum of $250.00 conditioned as above set out, with the Fidelity and Casualty Company of New York, as surety thereon, and said bond is now accepted and approved.

Dated March 4th, 1940.

(Signed) Harry J. Lemley, District Judge.

[fols. 281-283] Bond on appeal for $250.00 approved and filed March 4, 1940, omitted in printing.

[fol. 284] In United States District Court

[Title omitted]

Assignments of Error—Filed March 4, 1940

Comes now the plaintiff, The Sunshine Anthracite Coal Company, and in connection with its petition for appeal, files the following assignments of error on which they will rely on their appeal to the Supreme Court of the United States from the final decision of the three-judge District Court entered the 16th day of February, 1940.

The three-judge District Court erred:

1. In overruling plaintiff's motion to strike out of defendant's answer those paragraphs of defendant's answer setting up and alleging proceedings, findings and order before the National Bituminous Coal Commission determining that plaintiff's coal and all coals produced in the Spadra coal field in Johnson County, Arkansas, to be bitu-

minous coal within the meaning of the Bituminous Coal Act of 1937.

2. In excluding, upon objection, plaintiff's evidence of characteristics, nature and prior technical meaning given to the words "bituminous, semi-bituminous and sub-bituminous" by other departments of the government of the United States and by the former National Bituminous Coal Commission.

3. In admitting in evidence, over plaintiff's objection, certified transcript of proceedings had and held before the National Bituminous Coal Commission for the purpose of [fol. 285] determining whether or not certain coals in the State of Arkansas are subject to the provisions of the Bituminous Coal Act of 1937, and for the purpose of hearing applications for exemption, including that filed by The Sunshine Anthracite Coal Company.

4. In holding, in Conclusion of Law No. 3, that the District Court had no jurisdiction to determine whether "Plaintiff's coal is bituminous coal", as defined by the Bituminous Coal Act of 1937. Under Section 4-A and section 6 of the Act, the findings and order of the National Bituminous Coal Commission declared plaintiff's coal to be "bituminous coal" within the meaning of the Act, was an order which the Commission had jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

5. In holding, in Conclusion of Law No. 4, that in any event the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act.

6. In holding, in its Conclusion of Law No. 5, that section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

7. In holding, in its Conclusion of Law No. 6, that the Bituminous Coal Act of 1937, c. 127, 75th Congress, first session, 250 Statutes 72, is constitutional.

8. In holding, in its Conclusion of Law 6(a) that the regulatory provisions in section 4 of the Bituminous Coal Act

of 1937 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly effecting interstate commerce.

9. In holding, in its Conclusion of Law 6(b) that the establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable, is related to a proper [fol. 286] congressional purpose and does not violate the Fifth Amendment.

10. In holding, in its Conclusion of Law 6(c), that the standards of the Bituminous Coal Act of 1937 are sufficiently definite, and that said act contains no invalid delegation of legislative authority.

11. In holding, in its Conclusion of Law 6(d), that whether or not the taxing provisions of section 3(b) could be otherwise sustained, since the regulatory provisions of the act are valid, the taxing provisions of the act are likewise valid as affecting the valid regulatory purpose of the act.

12. In holding, in its Conclusion of Law 6(e), that the exemption from the tax imposed by section 3(b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

13. In holding, in its Conclusion of Law No. 7, that the bill of complaint should be dismissed.

14. In refusing to make the temporary injunction heretofore granted permanent.

Henry Adamson, George O. Patterson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 287] Citation in usual form showing service on Sam Rogers, filed March 4, 1940, omitted in printing.

[fol. 288] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 4, 1940

Comes now the plaintiff herein, and for the purposes of the appeal which has been allowed herein to the Supreme Court of the United States, requests the Clerk to prepare and forward to the Clerk of the Supreme Court of the United States at Washington, D. C., a transcript of the record in the above entitled cause, and to include in said transcript the following:

1. All pleadings and motions filed herein, and all rulings and orders entered by the court, including the order granting temporary injunction herein.

2. The court order constituting the three-judge court under the provisions of the United States Code Annotated, Title 28, Section 380(a).

3. All evidence introduced and offered at the trial herein.

4. Court's findings of fact and conclusions of law, filed herein on February 16, 1940.

5. Court's final decree herein, entered February 16, 1940.

6. Plaintiff's Petition for Appeal, filed herein March 4, 1940.

7. Plaintiff's Assignment of Errors, filed herein accompanying Petition for Appeal on the 4th day of March, 1940.

[fol. 289] 8. Plaintiff's Statement as to the jurisdiction of the Supreme Court, filed herein March 4, 1940, accompanying Petition for Appeal.

9. Court's order of March 4, 1940, allowing appeal and fixing bond and approving bond.

10. Citation to defendant and acceptance of service, filed herein on March 4, 1940.

11. Notice of Appeal to defendant and acceptance of service thereon, filed herein March 4, 1940.

12. Acceptance by defendant of service of copies of petition for an order allowing appeal, together with copy of Plaintiff's Assignment of Errors, plaintiff's statement of jurisdiction of the Supreme Court of the United States, and statement calling defendant's attention to the provisions of

Rule 12, paragraph 3 of the Revised Rules of the United States Supreme Court.

13. Otherwise a full and complete record of the proceedings herein.

14. A copy of this praecipe.

Henry Adamson, George O. Patterson, Attorneys for Plaintiff.

[fol. 290] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COUNTER-DESIGNATION—Filed March 8, 1940

Comes now the defendant, Homer M. Adkins, as Collector of Internal Revenue for the District of Arkansas, by Sam Rorex, United States Attorney for the Eastern District of Arkansas, and requests that there be incorporated in the transcript of the record in the above styled case the following papers, to-wit:

1. Opinion of the Court.

(Signed) Sam Rorex, United States Attorney for the Eastern District of Arkansas, by (S.) Leon B. Catlett, Asst. U. S. Attorney.

[fol. 291] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 292] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY—Filed March 12, 1940

Comes now the appellant herein and pursuant to rule 13, paragraph 9, files with the clerk his statement of points on which he intends to rely as follows: All points set out in the assignment of errors heretofore filed herein.

Henry Adamson, Attorney for Appellant.

We hereby acknowledge service of the above designation this 12th day of March, 1940.

Francis Biddle, Solicitor General.

[fol. 293] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF THE RECORD—Filed March 12, 1940

It is hereby stipulated by and between the Solicitor General, on behalf of the appellee, and the attorney for appellant in the above entitled cause that in order to reduce the size of the record and the cost of its printing, the clerk of the Supreme Court in printing the record may reduce its size as follows:

(1) Eliminate verification (R. 23).

(2) Eliminate all of R. 25 and substitute "Order designating three-judge court signed by Kimbrough Stone, senior Circuit Judge".

(3) Eliminate verification, at bottom of R. 32.

(4) Eliminate order granting leave to file supplement to answer (R. 34) but retain the heading.

(5) Eliminate R. 39 but retain the heading.

(6) Immediately following R. 42 print opinion of court on motion to strike, now included within the Jurisdictional Statement and found at R. 697-706.

(7) Eliminate R. 44.

(8) Eliminate R. 60 starting with words "The court" on line 4, down to words "George A. Merchant" on line 3, R. 61.

[fol. 294] (9) Eliminate defendant's Exhibit 1 appearing at R. 89-101, inc.

(10) Eliminate notary's certificate appearing at R. 135-136, inc.

(11) Eliminate plaintiff's Exhibit No. 2 appearing at R. 139-150, inc. (indicating that these documents are found at pp. 25-30, inclusive, of the printed transcript of the record in Sunshine Anthracite Coal Co. v. Ickes, October Term, 1939, No. 410, which is a part of this record).

(12) Eliminate entirely R. 162-177-F, inc.

(13) Eliminate entirely R. 185-186, inc.

(14) Eliminate entirely R. 188-195, inc.

(15) Eliminate R. 207, starting with "Alabama" in line 12, down to words "Anthracite Coal", line 8, R. 223.

(16) Eliminate R. 223 starting with "Pennsylvania Anthracite Coal" at bottom of page, and all of R. 224.

(17) Eliminate defendant's Exhibit No. 2, R. 256-675, inc., which is the certified transcript of record in this Court in Sunshine Anthracite Coal Co. v. Ickes, October Term, 1939, No. 410, it being understood that the printed records on file in that case may be used as a part of the record in this case without reprinting. This should be indicated immediately following R. 241.

(18) Eliminate all of R. 252 and all of R. 253 except last paragraph beginning with "Mr. Sher".

(19) Eliminate certificate of court reporter appearing at R. 254.

Dated this 12th day of March 1940.

Henry Adamson, Attorney for Appellant; Francis Biddle, Attorney for Appellee.

[fol. 295] [File endorsement omitted.]